(1) Supreme Court, U.S.
FILED

991193 JAN 13 2000

OFFICE OF THE CLERK

No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1999

RAYMOND FRAZER,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

MICHAEL B. DASHJIAN (Counsel of Record)
SYLVIA M. DASHJIAN
Law Offices of Michael B. Dashjian
1110 California Blvd. Suite D
(Mailing Address:) P.O. Box 512
San Luis Obispo, CA 93406-0512
Telephone: (805) 460-0300
Facsimile: (805) 460-0349
Email: firm@dashlaw.com
Counsel for the Petitioner

128pp

QUESTIONS PRESENTED (Rule 14.1(a))

1. Did the California Legislature's revival of the time-barred criminal case against petitioner, by a retroactive law enacted several years after expiration of the statute of limitations, violate the *Ex Post Facto* Clause?

2. Did the California Legislature's revival of the time-barred criminal case against petitioner, by a retroactive law enacted several years after expiration of the statute of limitations, violate the Due Process Clause?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PETITION FOR WRIT OF CERTIORARI 1

I. OPINION BELOW 1

II. JURISDICTIONAL STATEMENT 1

III. CONSTITUTIONAL AND STATUTORY PROVISIONS 2

IV. STATEMENT OF THE CASE 2
- A. Background; Procedural History 2
- B. Presentation Of The Federal Claims In State Court 3

V. REASONS FOR GRANTING THE WRIT 5
- A. Issue One: *Ex Post Facto* 5
- B. Issue Two: Due Process 13

ARGUMENT 17

I. Retroactive Abolition Of Petitioner's Complete Limitations Defense Violated The *Ex Post Facto* Clause 17

II. Retroactive Abolition Of Petitioner's Complete Limitations Defense Violated The Due Process Clause 25
- A. Fundamental Fairness 25
- B. "Substantive" And "Procedural" Statutes Of Limitation 26

CONCLUSION 30

APPENDIX (Exhibits A-G) ..... *post*

TABLE OF AUTHORITIES

CASES

Ackerman v. Ackerman, 42 Va. Cir. 103 (1997) 27

Adams v. Woods, 2 Cranch (6 U.S.) 336 (1805) 12

Baker v. Stonebraker, 36 Mo. 338 (1865) 26, 27

Beach v. Ocwen Federal Bank, 523 U.S. 510 (1997) ... 27, 28

Beazell v. Ohio, 269 U.S. 167 (1925) 6, 7, 11, 18-20, 24

Belair v. Riverside County Flood Control Dist., 47 Cal.3d 550, 253 Cal.Rptr. 693, 764 P.2d 1070 (1988) 4

Benes v. United States, 276 F.2d 99 (6th Cir. 1960) 10

Board of Regents v. Roth, 408 U.S. 564 (1972) 29

Brent v. Chapman, 5 Cranch (9 U.S.) 358 (1809) 27

Brown v. Parker, 28 Wis. 21 (1871) 27

Brown v. Walker, 161 U.S. 591 (1896) 11

Calder v. Bull, 3 Dall. (3 U.S.) 386 (1798) 7, 12, 17, 21, 24

California Department of Corrections v. Morales, 514 U.S. 499 (1995) 5, 7, 18, 19

Cameron v. United States, 231 U.S. 710 (1914) 26

Campbell v. Holt, 115 U.S. 620 (1885) 16, 17, 27, 28

Carmell v. Texas (U.S. No. 98-7640, *cert. grd.*, June 14, 1999) 7, 12, 13

Chase Securities Corp. v. Donaldson,
325 U.S. 304 (1945) 15-17, 26-29

Chevron Chemical Co. v. Superior Court, 131 Ariz. 431,
641 P.2d 1275 (1982) 29

Christmas v. State, 700 So.2d 262 (Miss. 1997) 9

Cohens v. Virginia, 6 Wheat. (19 U.S.) 264 (1821) 18

Cole v. Alodex Corp., 533 F.2d 372 (8th Cir. 1976),
aff'g In re Alodex Securities Litigation,
392 F.Supp. 672 (S.D. Iowa 1975) 16

Cole v. National Life Ins. Co., 549 So.2d 1301
(Miss. 1989) 27

Collins v. Youngblood, 497 U.S. 37 (1990) .. 5-7, 9-11, 17-19,
22, 24

Colony Hill Condominium I Ass'n v. Colony Co.,
70 N.C. App. 390, 320 S.E.2d 273
(1984), *rev. den.*, 312 N.C. 796,
325 S.E.2d 485 (1985) 16

Commonwealth v. Guimento, 341 Pa. Super. 95,
491 A.2d 166 (1995) 8

Commonwealth v. Rocheleau, 404 Mass. 129,
533 N.E.2d 1333 (1989) 8

Country Mutual Ins. Co. v. Knight, 40 Ill.2d 423,
240 N.E.2d 612 (1968) 27

Cowan v. Superior Court, 14 Cal.4th 367,
58 Cal.Rptr.2d 458, 926 P.2d 438 (1997) 14

Cummings v. Missouri, 4 Wall. (71 U.S.) 277 (1866) 10

Davis v. Mills, 194 U.S. 451 (1904) 15-17, 26-28

Davis v. Valley Distributing Co., 522 F.2d 827
(9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977) . 29

Day v. City of Clinton 6 Ill.App. 476 (1880) 10

Dugger v. Williams, 593 So.2d 180 (Fla. 1991) 10

Estate of Fisher v. C.I.R., 905 F.2d 645 (2d Cir. 1990) 11

Ex Parte Scales, 853 S.W.2d 586
(Tex. Ct. Crim. App. 1993) 10

Falter v. United States, 23 F.2d 420 (2d Cir.),
cert. denied, 277 U.S. 590 (1928) 8, 9, 13, 25

Fletcher v. Peck, 6 Cranch (10 U.S.) 87 (1810) 21

Haase v. Sawicki, 20 Wis.2d 308, 121 N.W.2d 876 (1963) . 16

Hale v. Henkel, 201 U.S. 43 (1906) 11

Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880,
cert. dismissed, 320 U.S. 806 (1943) 8

Hughes Aircraft Corp. v. United States ex rel. Schumer,
520 U.S. 939 (1997) 6, 19, 24

In re Brown, 9 Cal.3d 612, 108 Cal.Rptr. 465,
510 P.2d 1017 (1973) 16

In re Demillo, 14 Cal.3d 598, 121 Cal.Rptr. 725,
535 P.2d 1181 (1975) 14

In re Doyle, 257 N.Y. 244, 177 N.E. 489 (1931) 10, 11

In re Gustavo M., 214 Cal.App.3d 1485,
263 Cal.Rptr. 328 (1989) 10

In re Landsberg, 14 F. Cas. 1065 (No. 8,041) (E.D. Mich. 1870) 10

In re Rights to Waters of Long Valley Creek Stream System, 25 Cal.3d 339, 158 Cal.Rptr. 350, 599 P.2d 656 (1979) 29

Independent School Dist. No. 197 v. W. R. Grace & Co., 752 F.Supp. 286 (D. Minn. 1990) 17

International Shoe Co. v. State of Washington, 326 U.S. 310 (1945) 14

International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 28

James v. United States, 366 U.S. 213 (1961) 20

Kelly v. Marcantonio, 678 A.2d 873 (R.I. 1996) 16

Kring v. Missouri, 107 U.S. 221 (1883) 20

Kurzawa v. Jordan, 146 F.3d 435 (7th Cir. 1998) 16

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 6, 14, 19, 20, 25

Lynce v. Mathis, 519 U.S. 433 (1997) 19, 23

Mid-State Horticultural Co. v. Pennsylvania Ry. Co., 320 U.S. 356 (1943) 28

Miller v. Florida, 482 U.S. 423 (1987) 21

Moore v. State, 43 N.J.L. 203 (1881) 8, 30

Nachtsheim v. Wartnick, 411 N.W.2d 882 (Minn. Ct. App. 1987) 17

Nixon v. Administrator of General Services,
433 U.S. 425 (1977) 19

Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991) 14

People v. Angel, 70 Cal.App.4th 1141,
83 Cal.Rptr.2d 222 (1999) 19

People v. Bunn, 53 Cal.App.4th 227,
61 Cal.Rptr.2d 734 (1997) 2

People v. Frazer, 21 Cal.4th 737, 88 Cal.Rptr.2d 312,
982 P.2d 180 (1999) . 3, 8, 9, 11-16, 19, 21, 23, 25, 26, 29

People v. Hoffman, 132 Cal.App. 60, 22 P.2d 229 (1933) .. 10

People v. McGee, 1 Cal.2d 611, 36 P.2d 378 (1934) 14, 15, 29

People v. Morris, 46 Cal.3d 1, 249 Cal.Rptr. 119,
756 P.2d 843 (1988) 14, 15, 29

People v. Stevenson, 416 Mich. 383,
331 N.W.2d 143 (1982) 21

People v. Stogner, Contra Costa County No. 9816224
(Cal. 1st Appellate Dist. No. A084772) 12

People v. Zamora, 18 Cal.3d 538, 134 Cal.Rptr. 784,
557 P.2d 75 (1976) 14, 18, 29

Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) 11

Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Hine,
25 Ohio St. 629 (1874) 27

Pritchard v. Norton, 106 U.S. 124 (1882) 26, 27

Roberts v. State of Maine, 48 F.3d 1287 (1st Cir. 1995) 14

Shadburne-Vinton v. Dalkon Shield Claimants Trust, 60 F.3d 1071 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996) 17, 28

Shelby v. Guy, 11 Wheat. (24 U.S.) 361 (1826) 27

Smith v. Westinghouse Electric Corp., 266 Md. 52, 291 A.2d 452 (1972) 16

State of Minnesota ex rel. Hove v. Doese, 501 N.W.2d 366 (S.D. 1993) 26

State of South Dakota ex rel. Dotson v. Serr, 506 N.W.2d 421 (S.D. 1993), *cert. denied*, 510 U.S. 1177 (1994) 27

State v. Carrier, 822 S.W.2d 623 (Tenn. Ct. Crim. App. 1991) 10

State v. Cookman, 324 Ore. 19, 920 P.2d 1086 (1996) ... 8, 10

State v. Keith, 63 N.C. 140 (1869) 10

State v. Lafil, 231 La. 551, 92 So.2d 63 (1956) 10

State v. Shedd, 702 P.2d 267 (Colo. 1985) 8

State v. Short, 131 N.J. 47, 618 A.2d 316 (1993) 8

State v. Sneed, 25 Tex. 66 (1860) 8

Stewart v. Keyes, 295 U.S. 403 (1935) 15, 27, 28

Toussie v. United States, 397 U.S. 112 (1970) 12

Twenty Per Cent Cases, 20 Wall. (87 U.S.) 179 (1873) 30

United States v. American Railway Express Co., 265 U.S. 425 (1924) 4

United States v. Bischel, 61 F.3d 1429 (9th Cir. 1995) 9

United States v. Brechtel, 997 F.2d 1108 (5th Cir. 1993) 9

United States v. Brown, 381 U.S. 437 (1965) 21

United States v. Cain, No. 94 CR 483,
1995 U.S. Dist. LEXIS 6319
(N.D. Ill. May 10, 1995) 9

United States v. Fraidin, 63 F.Supp. 271 (D. Md. 1945) ... 11

United States v. Jackson, 528 A.2d 1211
(D.C. Ct. App. 1987) 10

United States v. Knipp, 963 F.2d 839 (6th Cir. 1992) 8, 9

United States v. Madia, 955 F.2d 538 (8th Cir. 1992) 9

United States v. Marion, 404 U.S. 307 (1971) 12, 26

United States v. Morgan, 845 F.Supp. 934 (D. Conn. 1994),
aff'd on other grds., 51 F.3d 1105 (2d Cir.),
cert. denied, 516 U.S. 861 (1995) 9

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) ... 28

Vasquez v. State, 557 S.W.2d 779 (Tex. Ct. Crim.
App. 1977) 10, 11

Walsh v. Mayer, 111 U.S. 31 (1884) 27

Warren v. United States Parole Commission,
659 F.2d 183 (D.C. Cir. 1981),
cert. denied, 455 U.S. 950 (1982) 21

Weaver v. Graham, 450 U.S. 24 (1981) 14

Wesley Theological Seminary v.United States Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) 17

William Danzer & Co. v. Gulf & S.I.R. Co., 268 U.S. 633 (1925) 15-17, 26-28

Wilson v. Garcia, 471 U.S. 261 (1985) 12

Zenith Radio Corp. v. United States, 437 U.S. 443 (1978) .. 18

STATUTES

26 U.S.C. § 6531 22

28 U.S.C. § 1257 1

California Penal Code § 192 22

California Penal Code § 288 2

California Penal Code § 800 ..... 2, 29

California Penal Code § 803 ..... 2, 29, 30

California Penal Code § 805.5 29

CONSTITUTIONS

United States Constitution, Amendment V 2, 11

United States Constitution, Amendment XIV .. 2, 16, 25, 27-29

United States Constitution, Article I, section 10 2

COURT RULES

Supreme Court Rule 10 5

Supreme Court Rule 13.3 1

Supreme Court Rule 14.1 ..... i, 1, 2, 5

OTHER AUTHORITIES

Madison, James, The Federalist No. 44 ..... 20, 21

PETITION FOR WRIT OF CERTIORARI

Defendant Raymond Frazer respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the Supreme Court of the State of California, entered by opinion issued on August 30, 1999 and modified on October 20, 1999.

I. OPINION BELOW (Rule 14.1(d))

The opinion of the Supreme Court of California (attached as Appendix, Exh. A) was filed on August 30, 1999. It is reported officially at 21 Cal.4th 737, and unofficially at 88 Cal.Rptr.2d 312 and 982 P.2d 180. On October 20, 1999, the California Supreme Court issued an order modifying its opinion, without change in judgment. (Exh. B). It is reported at 21 Cal.4th 867A. Also on October 20, 1999, in an unpublished order (Exh. C), the California Supreme Court denied a timely petition for rehearing.

II. JURISDICTIONAL STATEMENT (Rule 14.1(e))

The opinion of the Supreme Court of California of which petitioner seeks review, reversing the order granting petitioner's demurrer to the information, was filed on August 30, 1999. Exh. A. The opinion was modified without change in judgment on October 20, 1999. Exh. B. Also on October 20, 1999, the Supreme Court of California denied a timely petition for rehearing. Exh. C. This petition is filed under Supreme Court Rule 13.3.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS (Rule 14.1(f))

United States Constitution, Article I, section 10, clause 1:

"No State shall . . . pass any . . . ex post facto Law . . . ."

United States Constitution, Amendment XIV:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

California Penal Code, sections 288(a), 800, 803(g). *See* Appendix, Exhibit G.

IV. STATEMENT OF THE CASE (Rule 14.1(g))

A. Background; Procedural History

Between 1982 and 1996, the statute of limitations for the charged offense of lewd act with a child under 14, Cal. Pen. Code § 288(a), was 6 years. Cal. Pen. Code § 803 [6-year statute for crimes punishable by 8 years or more in prison]; *see* § 288(a) [lewd act with child under 14 punishable by 3, 6 or 8 years].

Effective January 1, 1994, the California Legislature enacted Penal Code section 803(g), which provided a limitations period of one year from the date a person of any age reported to a law enforcement agency that he or she was a victim of a lewd act while under the age of 18 (*inter alia*). Stats. 1993, ch. 390 (A.B. 290), § 1. It was then unclear whether the Legislature intended the new limitations period to apply retroactively. *See People v. Bunn*, 53 Cal.App.4th 227, 230-31, 61 Cal.Rptr.2d 734 (1997).

Effective January 1, 1997, the Legislature again amended section 803(g), making clear that it intended the new limitations period to apply retroactively. Stats. 1996, ch. 130 (A.B. 2014), § 1.

In this case, the Complaint filed on October 21, 1996 charged petitioner with one count of violating Penal Code section 288(a) between October 1, 1984 and December 31, 1984. Clerk's Transcript (CT) 3. On December 5, 1996, defendant filed a demurrer based on the statute of limitations. CT 7. The Municipal Court sustained the demurrer, CT 32 (Exh. E), and dismissed the action. CT 37. The State moved for reconsideration in the Superior Court. CT 38. The Superior Court denied the motion, CT 65 (Exh. F), and denied the request to reinstate the Complaint. CT 68.

The State appealed to the First District Court of Appeal, which affirmed the dismissal on December 22, 1997 in an unpublished opinion. Exh. D. The State's petition for review to the California Supreme Court was granted on March 11, 1998.

On August 20, 1999, in a 4-3 opinion, the California Supreme Court reversed the judgment of the Court of Appeal. Exh. A. Defendant's timely petition for rehearing was denied on October 20, 1999, with a minor change in the opinion. Exhs. B, C.

The Petition for Writ of Certiorari in this case is taken from the decision of the California Supreme Court.

B. Presentation Of The Federal Claims In State Court

Both of the federal claims presented in this petition were decided in an opinion on the merits which constituted a final judgment rendered by the highest state court, the California Supreme Court. *People v. Frazer*, App. A, 21 Cal.4th 737. Petitioner raised both of those federal claims in the State's appeal to the California Supreme Court, in his Respondent's Brief on the merits, specifying the federal nature of the claims and relying on federal constitutional authority. Respondent's Brief on the Merits, at 2-16 [*Ex Post Facto*]; *id.* at 1, 9-10, 15-16 [Due Process].

The State's opening brief in its appeal to the highest state court had not raised a Due Process Clause issue. Under state law, petitioner was permitted to raise that issue in response as grounds for affirmance, and the California Supreme Court was permitted to

consider it. *Belair v. Riverside County Flood Control Dist.*, 47 Cal.3d 550, 568, 253 Cal.Rptr. 693, 764 P.2d 1070 (1988) [reviewing court reviews result, not reasoning, and can affirm on any proper legal ground]; *see United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924) [similar]. The State agreed the Due Process issue was properly before the Court, and addressed it in its reply brief. Appellant's Reply Brief on the Merits, at 14-31.

Petitioner further addressed the Due Process claim in the California Supreme Court in a timely petition for rehearing, which specified the federal nature of the claim and relied on federal constitutional authority. Petition for Rehearing, at 16-19. The petition for rehearing was denied without opinion. Exh. C.

Both federal claims in this petition were originally raised by petitioner in his demurrer in the Municipal Court, specifying violations of the federal *Ex Post Facto* and Due Process Clauses, and relying on federal constitutional authority for both claims. CT 13-15. The State's request for reconsideration in the Superior Court raised only an *Ex Post Facto* issue; petitioner defended by making the same *Ex Post Facto* and Due Process Clause claims he made in the Municipal Court. CT 56-58. The State's appeal to the Court of Appeal, First Appellate District, again raised only an *Ex Post Facto* issue; petitioner defended on that ground, specifying the federal nature of the claim and relying on federal constitutional authority. Respondent's Brief, at 2-11. As noted above, petitioner raised both the federal *Ex Post Facto* Clause claim and the federal Due Process Clause claim in defending the State's appeal to the California Supreme Court, specifying the federal nature of the claims and relying on federal constitutional authority, and the California Supreme Court decided both of those federal claims on their merits.

V. REASONS FOR GRANTING THE WRIT
(Rules 10, 14.1(h))

This case presents important federal issues on which there are conflicts among state courts of last resort. These issues require resolving ambiguous and possibly contradictory language from this Court's opinions, to determine which state court decisions were decided in a way that conflicts with decisions of this Court.

A. Issue One: *Ex Post Facto*

In *Collins v. Youngblood*, 497 U.S. 37 (1990), this Court held that a change in Texas appellate procedure, allowing an appellate court to affirm the valid portion of a criminal judgment instead of having to reverse the entire judgment when only part was invalid, did not violate the *Ex Post Facto* Clause. The Fifth Circuit had held the contrary, based on language from prior opinions of this Court that retroactive deprivation of any "substantial protection" was prohibited in a criminal case. This Court reversed, holding that the "substantial protection" formulation was amorphous and virtually meaningless, and not a proper statement of the *Ex Post Facto* Clause. 457 U.S. at 44-46.

At some points, the *Youngblood* opinion stated that the *Ex Post Facto* Clause covers only laws that affect either the "definition of a crime," or the amount of punishment for a crime. 497 U.S. at 43, 44, 49; *see also California Department of Corrections v. Morales*, 514 U.S. 499, 504 (1995) [similar language]. The California Supreme Court took these statements literally, in holding a retroactive criminal statute only violates the *Ex Post Facto* Clause if it disadvantages the accused by changing (i) the definition of a crime, or (ii) its punishment. App. A, 21 Cal.4th at 756-57, 759-61, 763, 764 n.26. The Court thus held a Legislature can abolish a fully ripe, complete limitations defense years after the statute's expiration, retroactively stripping the accused of a statutory right to acquittal, because a statute of limitations is not technically part of the "definition of the crime." App. A, 21 Cal.4th at 758-60 & n.22. That reasoning also applies to other complete defenses which would result in acquittal but might not involve the

"definition of a crime," or that ripen only after the alleged crime, such as pardon, amnesty, immunity, and others.

This case thus raises the issue of whether this Court in *Youngblood* intended such a literal use of the phrase "definition of the crime," to permit retroactive abolition of a complete and fully ripe limitations defense which would have resulted in acquittal; or by parity of reasoning, retroactive abolition of other defenses such as pardon, amnesty or immunity which might not involve the "definition of a crime," but which would also result in acquittal.

That issue is of particular importance because other passages in opinions of this Court—including *Youngblood* and *Beazell v. Ohio*, 269 U.S. 167 (1925)—point away from a literalistic "definition of the crime" approach. Recently, this Court cited *Youngblood* as standing for the proposition that "'A law that abolishes an affirmative defense' violates the Ex Post Facto Clause." *Hughes Aircraft Corp. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997). In *Youngblood* as well as *Beazell*, this Court referred to deprivation of "any defense previously available" as an *ex post facto* violation. *Youngblood*, 497 U.S. at 42, 49-52; *Beazell*, 269 U.S. at 170. Also in *Youngblood*, this Court—though rejecting the phrase "substantial right" as largely meaningless—still distinguished between "procedural" changes, which usually do not violate the *Ex Post Facto* Clause, 497 U.S. at 46, and "changes in the substantive law of crimes," which do. *Id.* at 45; *see also Landgraf v. USI Film Products*, 511 U.S. 244, 290 (1994) (Scalia, J., concurring in the judgments) [in *Ex Post Facto* jurisprudence, "we have adopted a substantive-procedural line"]. And in *Beazell*, this Court indicated that retroactive abolition of "matter[s] of substance" is an *ex post facto* violation. 269 U.S. at 171. Using these formulations instead of a literal "definition of the crime" formulation, retroactive abolition of a complete limitations defense would more likely be seen as violating the *Ex Post Facto* Clause.

Certiorari should be granted to determine which of this Court's formulations correctly states the *ex post facto* prohibition.

This Court's *Youngblood* opinion also suggested that the four categories enumerated by Justice Chase in *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 390-91 (1798) (opn. of Chase, J.) "define[d] an exclusive list of legislative Acts falling within the constitutional prohibition." *Youngblood*, 497 U.S. at 42, 48-49. The California Supreme Court went a step farther, holding that this Court (1) eliminated one of the four categories and held that the other three were an exclusive list, in *Beazell v. Ohio*, and (2) approved of this new *"Beazell* formulation" in *Youngblood,* while "distill[ing] it into a concise two-part test." App. A, 21 Cal.4th at 754-56 & n.16.

Petitioner's case thus raises the issues of whether this Court really intended to create a separate "*Beazell* formulation" or "*Youngblood* two-part test," and whether either those formulations or the four *Calder* categories are to be construed literally and exclusively. Again, that issue would also affect other defenses, such as pardon, amnesty, and immunity, which might also be difficult to fit into one of these typologies. (This Court is currently considering issues relating to the fourth *Calder* category, in *Carmell v. Texas* (U.S. No. 98-7640, *cert. grd.,* June 14, 1999).)

The issue of exclusivity of the "*Beazell* formulation" or the "*Youngblood* two-part test" is particularly important, because other language in this Court's opinions appears to contradict the California Supreme Court's view that this Court has restricted *ex post facto* violations to fixed categories. In *Calder*, Justice Chase stated that his categories were not exclusive. 3 Dall. at 389, 391, 393. In *Beazell*, this Court stated that it could not "embrace[] within a formula or state[] in a general proposition" which matters of procedure are within the *ex post facto* prohibition; "[t]he distinction is one of degree." 269 U.S. at 171. Most recently, well after *Youngblood*, this Court stated: "We have previously declined to articulate a single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition . . . ." *California Department of Corrections v. Morales*, 514 U.S. at 509.

The grant of certiorari in *Collins v. Youngblood* allowed this Court to resolve differing and sometimes contradictory

language it had used to describe the proscriptions of the *Ex Post Facto* Clause, and to clarify the content of those proscriptions. *See* 497 U.S. at 45. Certiorari is warranted in this case for the same reason, and to determine if the California Supreme Court's opinion properly characterizes this Court's precedent in the area.

There is a split of authority among national jurisdictions on retroactive revival of time-barred criminal actions. States other than California which have squarely faced the question have held that legislative revival of a time-barred action violates the federal *Ex Post Facto* Clause. *Commonwealth v. Rocheleau*, 404 Mass. 129, 533 N.E.2d 1333 (1989)[1]; *State v. Shedd*, 702 P.2d 267 (Colo. 1985); *Moore v. State*, 43 N.J.L. 203, 214-24 (1881) [cited with approval in *State v. Short*, 131 N.J. 47, 55, 618 A.2d 316 (1993)]; *State v. Sneed*, 25 Tex. 66, 67 (1860) [cited with approval in *Hill v. State*, 146 Tex. Crim. 333, 336, 171 S.W.2d 880, *cert. dismissed*, 320 U.S. 806 (1943)]; *see also State v. Cookman*, 324 Ore. 19, 920 P.2d 1086 (1996) [state Constitution]; *Commonwealth v. Guimento*, 341 Pa. Super. 95, 491 A.2d 166 (1995) [same].

Many other jurisdictions have agreed, often relying on a frequently quoted opinion by Judge Learned Hand, *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928). Despite the widespread reliance on Judge Hand's formulation, the California Supreme Court majority correctly noted that most of these opinions did not squarely face the issue, because the underlying cases had never been time-barred. *See People v. Frazer*, App. A, 21 Cal.4th at 762, 764 n.25 [citing 28 cases].[2]

---

[1] *Rocheleau* does not specifically state whether its holding was based on the state or federal Constitution. However, Massachusetts interprets its state *Ex Post Facto* Clause identically to the federal counterpart. *Santiago v. Commonwealth*, 427 Mass. 298, 301, 693 N.Ed.2d 127 (1998). Accordingly, the holding is presumably based on both.

[2] These cases usually involved the different issue of legislative extension of a criminal statute of limitations before it expires. Most opinions hold this is permissible. *See, e.g., United States v. Knipp*, 963 F.2d 839, 844 (6th Cir. 1992); (continued...)

California appears to be the only jurisdiction which has squarely held that Legislative revival of time-barred criminal actions is permissible. *See People v. Frazer*, App. A, 21 Cal.4th at 777, 782 (Kennard, J., dissenting). However, California has some 12 percent of our Nation's population.

In addition, statute of limitations cases in other jurisdictions have construed *Youngblood* as the California Supreme Court did, to require literal use of the phrase "definition of the crime" in *ex post facto* determinations. The California Supreme Court relied on one of those cases, which similarly concluded that retroactive abolition of any criminal limitations defense would not violate the *Ex Post Facto* Clause. *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992) (discussed with approval in *People v. Frazer*, App. A, 21 Cal.4th at 764 n.26). Other cases which construe *Youngblood* the same way, to conclude that no statute of limitations defense is subject to the *Ex Post Facto* Clause, include *United States v. Brechtel*, 997 F.2d 1108, 1113 & n. 13 (5th Cir. 1993); *United States v. Bischel*, 61 F.3d 1429, 1435-36 (9th Cir. 1995); *Christmas v. State*, 700 So.2d 262, 267-68 (Miss. 1997); *United States v. Morgan*, 845 F.Supp. 934, 943 (D. Conn. 1994), *aff'd on other grds.*, 51 F.3d 1105 (2d Cir.), *cert. denied*, 516 U.S. 861 (1995); and *United States v. Cain*, No. 94 CR 483, 1995 U.S. Dist. LEXIS 6319 (N.D. Ill. May 10, 1995), at 3-4. (The facts of these cases involved extension of a statute of limitations before it expired, which is usually held to be permissible. *See supra*, fn. 2.)

Given the split of authority on legislative revival of time-barred criminal actions, and the differing methods of analyzing this issue—with many jurisdictions using Judge Hand's formulation, while others construe this Court's *Youngblood* opinion to require

---

[2](...continued)
United States v. Madia, 955 F.2d 538, 539 (8th Cir. 1992). It is not at issue here.

The dissent in the California Supreme Court also quoted approvingly from Judge Hand's *Falter* opinion. App. A, 21 Cal.4th at 776 (Kennard, J., dissenting); *see also id.* at 782 (Brown, J., dissenting) [concurring in Justice Kennard's analysis].

a literal "definition of the crime" approach—certiorari is warranted to resolve this important federal issue.

California's literal "definition of the crime" interpretation of *Youngblood* also creates another conflict among jurisdictions. A literal "definition of the crime" approach means that Legislatures can retroactively eliminate any defense to a criminal charge which ripens only after the (charged) commission of the offense, including defenses such as a pardon, amnesty, or immunity. These defenses, even more than a statute of limitations defense, are difficult to characterize as part of the "definition of the crime."[3]

Other jurisdictions have found an *ex post facto* violation on this type of issue. Apart from the statute of limitations cases above, cases include: *State v. Keith*, 63 N.C. 140, 143-45 (1869) [pardon]; *Day v. City of Clinton* 6 Ill.App. 476, 479-80 (1880) [repeal of statute creating crime, treated as a pardon]; *In re Landsberg*, 14 F. Cas. 1065, 1068 (No. 8,041) (E.D. Mich. 1870) [similar]; *Ex Parte Scales*, 853 S.W.2d 586 (Tex. Ct. Crim. App. 1993) [judicially created immunity from multiple convictions, analyzed under law governing *ex post facto* laws]; and *United States v. Jackson*, 528 A.2d 1211, 1223-24 (D.C. Ct. App. 1987) [judicial overruling of "year and a day rule," analyzed under law governing *ex post facto* laws]. *Cf. Dugger v. Williams*, 593 So.2d 180, 182 (Fla. 1991) [retroactive revocation of eligibility for clemency recommendation invalid as *ex post facto*]. This Court has agreed in dictum, *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277, 329 (1866), but it has never squarely faced this type of issue.

---

[3] Cases have referred to the expiration of a criminal limitations period as a form of pardon, immunity or amnesty; for like a pardon, immunity or amnesty, it eliminates all possible consequences of an (alleged) offense. *E.g., State v. Cookman*, 324 Ore. 19; *State v. Carrier*, 822 S.W.2d 623, 624-25 (Tenn. Ct. Crim. App. 1991); *In re Gustavo M.*, 214 Cal.App.3d 1485, 1494, 263 Cal.Rptr. 328 (1989); *Vasquez v. State*, 557 S.W.2d 779, 781 (Tex. Ct. Crim. App. 1977); *Benes v. United States*, 276 F.2d 99, 108 (6th Cir. 1960); *State v. Lafil*, 231 La. 551, 562-63, 92 So.2d 63 (1956); *People v. Hoffman*, 132 Cal.App. 60, 63, 22 P.2d 229 (1933); *In re Doyle*, 257 N.Y. 244, 256, 177 N.E. 489 (1931).

Although historical practice is often important in interpreting constitutional provisions, determining historical practice on retroactive abolition of a criminal limitations defense is problematic, as criminal statutes of limitation were apparently unknown to the common law. *People v. Frazer*, App. A, 21 Cal.4th at 770 n.30; *Vasquez v. State*, 557 S.W.2d 779, 781 (Tex. Ct. Crim. App. 1977); *United States v. Fraidin*, 63 F.Supp. 271, 278-79 (D. Md. 1945). It can be difficult to discern what the Framers thought on a matter that didn't exist when the Constitution was ratified. This difficulty only underscores the need for this Court to resolve the conflicts among jurisdictions, and provide a definitive interpretation of its own *Youngblood* and *Beazell* opinions.

The California Supreme Court's opinion here may also create ripple effects in other important areas of federal law. For example, witnesses historically have been unable to invoke the Fifth Amendment privilege after a statute of limitations expires or after a pardon or grant of immunity, on the ground that such a witness can never be prosecuted. *See, e.g., Hale v. Henkel*, 201 U.S. 43, 67 (1906); *Brown v. Walker*, 161 U.S. 591, 598-99, 627 (1896). But this established rule is open to question under the California Supreme Court opinion, on the ground that prosecution is always possible because the Legislature can retroactively abolish a statute of limitations (or pardon or immunity) whenever it wants. *See generally, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 257, 261 (1983) [Fifth Amendment requires certainty that witness cannot be prosecuted, before he can be compelled to answer]; *Brown v. Walker*, 161 U.S. at 595 [similar]; *In re Doyle*, 257 N.Y. at 250 [similar]; *see also, e.g., Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649 (2d Cir. 1990) [Fifth Amendment privilege does not turn on court's assessment of Government's subjective intent to prosecute, or subjective likelihood of prosecution]. That type of issue is not presented here, but it may have to be faced if the California Supreme Court opinion were to stand.

The issue in this case is far-reaching. The California Supreme Court's view is that under section 803(g), a Legislature can retroactively revive an action that had been time-barred for 5, 10, or 20 years, or even more. Petitioner is aware of one recent case

where the prosecution used section 803(g) to charge a defendant with acts alleged to have occurred in the 1950's, over 40 years ago.[4]

Moreover, the California Supreme Court's opinion is not limited to any one area of law. As a matter of constitutional analysis, a Legislature following this opinion can now lengthen any criminal statute of limitations indefinitely, any time after expiration of the original statute. Such a legislative power impairs the policies served by criminal statutes of limitation as much for innocent defendants as guilty ones. *See, e.g., Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *United States v. Marion*, 404 U.S. 307, 322-23 (1971); *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) [quoting *Adams v. Woods*, 2 Cranch (6 U.S.) 336, 342 (1805)].

This is an issue which will continue to recur, as it is not uncommon for Legislatures to extend criminal limitations periods. In particular, the California Supreme Court's opinion noted that in the late 1980s, Legislatures nationwide began increasing substantially limitations periods for child molestation charges, and applying the increases retroactively. *People v. Frazer*, App. A, 21 Cal.4th at 744 & n.3. The opinion in this case opens the door to all of them as a matter of federal constitutional law, and to revivals of time-barred criminal actions in every other area of law as well.

This Court is currently considering another *ex post facto* issue, involving the fourth category of *Calder v. Bull*, in *Carmell v. Texas* (U.S. No. 98-7540, *cert. grd.*, June 14, 1999). An *amicus curiae* brief filed in *Carmell* argued against petitioner's position here, relying on the California Supreme Court's opinion in this case. *See* Br. of the Amici Curiae States (No. 98-7540), at 12-14. The issue of reviving time-barred actions is not actually before this Court in *Carmell*. Nonetheless, the States' *amicus curiae* brief in

---

[4] The case is *People v. Stogner*, Contra Costa County No. 9816224 (1st Appellate Dist. No. A084772). (The defendant in *Stogner* is apparently 72 years old.) The Court of Appeal in *Stogner* followed the California Supreme Court's *Frazer* opinion, and permitted revival of the time-barred action. The case is currently on a petition for review to the California Supreme Court.

Carmell underscores the importance of the issue presented by petitioner, and the conflict in authority on the issue.[5]

This issue provides an excellent opportunity to clarify the scope of the *Ex Post Facto* Clause, in a manner which has not been necessary in prior cases. This Court's precedent makes clear that a retroactive change in mere forms of procedure does not violate the *Ex Post Facto* Clause, while a retroactive change in the "definition of a crime" does. A complete limitations defense falls somewhere in between. Determining *where* in between would likely result in a more complete definition of the scope of the Clause, because this Court has never been faced with this type of issue.

To resolve ambiguities and seeming contradictions in this Court's opinions; to resolve conflicts in authority, which cause substantial numbers of (present or future) defendants who are identically situated in the eyes of the Constitution to receive dissimilar treatment; and to settle an important constitutional issue, this Court should grant certiorari as to Issue One.

B. Issue Two: Due Process

In an oft-quoted passage discussed earlier (*supra*, p. 8), Judge Learned Hand wrote: "Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease on life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw his assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended . . . ." *Falter v. United States*, 23 F.2d at 425-26. Many opinions have quoted Judge Hand's language with approval. *See* cases (28) cited in *People v. Frazer*, App. A, 21 Cal.4th at 764 n.25.

---

[5] If Carmell were to prevail, then depending on what this Court's opinion said, the opinion could have an impact on the proper analysis or result here. That would be unlikely, however, if Carmell did not prevail.

Although Judge Hand was writing about the *Ex Post Facto* Clause, language such as "justice and fair play" is often associated with Due Process jurisprudence. *See, e.g., International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945); *Roberts v. State of Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995); *Ouimette v. Moran*, 942 F.2d 1, 13 (1st Cir. 1991). The dissenting Justices in this case agreed with Judge Hand, and concluded that legislative revival of time-barred criminal actions does not comport with fundamental fairness. *People v. Frazer*, App. A, 21 Cal.4th at 776, 780 (Kennard, J., dissenting); *id.* at 782, 784 (Brown, J., dissenting).

This case thus presents the issue of whether Judge Hand was right. The Due Process Clause issue appears to be different from the *Ex Post Facto* Clause issue, because Due Process Clause principles such as vested rights are not determinative in *ex post facto* analysis. *Weaver v. Graham*, 450 U.S. 24, 29-30 & n. 13 (1981); *but cf. Landgraf v. USI Film Products*, 511 U.S. at 291 (Scalia, J., concurring in the judgments ["The upsetting of 'vested substantive rights' [is] the proper touchstone . . . for interpretation of the United States Constitution's *Ex Post Facto* Clauses."])

The issue is particularly acute in California and other jurisdictions like it, which view a criminal statute of limitations as a substantive protection rather than a mere procedural device. The law in California has long been that a criminal statute of limitations is a substantive protection rather than merely procedural, *People v. Zamora*, 18 Cal.3d 538, 547, 134 Cal.Rptr. 784, 557 P.2d 75 (1976), and that "[i]n criminal cases, the state, through its Legislature, has declared [in statutes of limitation] that it will not prosecute crimes after the period has run . . . ." *People v. McGee*, 1 Cal.2d 611, 613, 36 P.2d 378 (1934); *People v. Morris*, 46 Cal.3d 1, 13, 249 Cal.Rptr. 119, 756 P.2d 843 (1988). A California criminal statute of limitations is so substantive that it can be raised at any time, before or after judgment, including for the first time on appeal or habeas corpus. *Cowan v. Superior Court*, 14 Cal.4th 367, 371-72, 58 Cal.Rptr.2d 458, 926 P.2d 438 (1997); *In re Demillo*, 14 Cal.3d 598, 601, 121 Cal.Rptr. 725, 535 P.2d 1181 (1975).

From a perspective of fundamental fairness, legislative revival of a time-barred criminal action—particularly in a jurisdiction such as California where a criminal statute of limitations is substantive and not merely procedural—amounts to the State promising that it would not prosecute a particular charge, *see People v. McGee*, 1 Cal.2d at 613; *People v. Morris*, 46 Cal.3d at 13, and then reneging on the promise many years later. The dissenters in the California Supreme Court agreed. *People v. Frazer*, App. A, 21 Cal.4th at 781, 782 (Kennard, J., dissenting); *id.* at 782, 783 (Brown, J., dissenting). The question here is whether that violates the federal Due Process Clause.

If these considerations are not dispositive, then petitioner also asks this Court to reconcile two lines of its Due Process Clause cases, which date back to the 19th century; have not been reconciled by this Court; and have drawn differing views from lower courts. The California Supreme Court relied on this Court's opinion in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), to reject petitioner's Due Process claim. *People v. Frazer*, App. A, 21 Cal.4th at 766-69. That raises the issue of whether the California Supreme Court interpreted *Chase Securities* correctly.

The line of this Court's authority which supports petitioner includes *Davis v. Mills*, 194 U.S. 451, 456-57 (1904); *Stewart v. Keyes*, 295 U.S. 403, 417 (1935); and *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925). These and similar cases recognize a constitutionally protected interest upon the expiration of a "substantive" (as opposed to procedural) limitations period, one that extinguishes the right rather than merely barring a remedy. The two most common examples are limitations periods regarding title to real or personal property (*Stewart v. Keyes*), and limitations periods which substantively qualify a statutory enactment (*Davis v. Mills, William Danzer*). In both situations, the expiration of a statute of limitations—sometimes also called a statute of repose—is said to destroy the right rather than merely barring the remedy, creating a vested right which cannot be divested by retroactive legislation. *Davis v. Mills*, 194 U.S. at 456-57; *William Danzer*, 268 U.S. at 636-37; *Stewart v. Keyes*, 295 U.S. at 417. In California, a criminal statute of limitations is a substantive

limitation on the power to prosecute, *supra*, p. 14, which always substantively qualifies a statutory enactment because all crimes in California are statutory. Cal. Pen. Code, § 6; *In re Brown*, 9 Cal.3d 612, 624, 108 Cal.Rptr. 465, 510 P.2d 1017 (1973); *People v. Frazer*, App. A, 21 Cal.4th at 781-82 (Kennard, J., dissenting).

The cases where this substantive limitations (statute of repose) analysis applies are in contrast with the usual federal rule, that expiration of a typical procedural statute of limitations—as on a claim for a debt—creates no vested rights. *Chase Securities v. Donaldson*, 325 U.S. 304; *Campbell v. Holt*, 115 U.S. 620 (1885).

Chase Securities, the case on which the California Supreme Court relied here, declined to apply cases such as *Davis v. Mills* or *William Danzer* to its facts or legal claim. However, *Chase Securities* did not overrule or limit *Davis v. Mills* or *William Danzer* in their own context, and in fact it appears to have approved of those cases in their own context. *Chase Securities*, 325 U.S. at 312 n.8; *see Smith v. Westinghouse Electric Corp.*, 266 Md. 52, 56, 291 A.2d 452 (1972); *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996). *Chase Securities* is clearly applicable in its own context as well. The question is whether that is the context of this case, and how one goes about telling the difference.

Lower courts disagree on the vitality and meaning of the "substantive right" line of cases. Some courts, holding that this Court recognized a Fourteenth Amendment interest in cases such as *Davis v. Mills* and *William Danzer*, have held the federal Due Process Clause prohibits retroactive abolition of a complete defense based on a "substantive" statute of limitations. *Colony Hill Condominium I Ass'n v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E.2d 273, 276 (1984), *rev. den.*, 312 N.C. 796, 325 S.E.2d 485 (1985); *Cole v. Alodex Corp.*, 533 F.2d 372, 374 (8th Cir. 1976), *aff'g In re Alodex Securities Litigation*, 392 F.Supp. 672, 680-81 (S.D. Iowa 1975); *Smith v. Westinghouse Electric Corp.*, 266 Md. at 55-57; *Haase v. Sawicki*, 20 Wis.2d 308, 317, 121 N.W.2d 876 (1963); *see also Kurzawa v. Jordan*, 146 F.3d 435, 437 (7th Cir. 1998) [in dictum: "Because criminal statutes of limitations . . . are more analogous to civil statutes of repose, [defendant's] *William*

Danzer argument might be valid if we were dealing with the retroactive extension of a lapsed statute of limitations."]

Other courts have rejected the "substantive right" cases as outmoded. *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1074-1076 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996); *Wesley Theological Seminary v. United States Gypsum Co.*, 876 F.2d 119, 121-22 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 887-88 (Minn. Ct. App. 1987); *Independent School Dist. No. 197 v. W. R. Grace & Co.*, 752 F.Supp. 286, 296-298 (D. Minn. 1990). This Court has not squarely addressed the issue of whether or how to reconcile the two lines of opinions (*Chase Securities/Campbell v. Holt*, and *Davis v. Mills/William Danzer*).

For all of these reasons, certiorari should be granted on Issue Two.

ARGUMENT

I. Retroactive Abolition Of Petitioner's Complete Limitations Defense Violated The *Ex Post Facto* Clause

In focusing exclusively on "definition of the crime" language in this Court's *Youngblood* opinion, the California Supreme Court eschewed several of this Court's broader formulations of the *ex post facto* prohibition, in cases beginning with *Calder* and continuing after *Youngblood.* Petitioner quoted several of those formulations *supra*, pp. 6, 7.

These broader formulations establish that this Court has not required an *ex post facto* analysis anywhere near as narrow as the California Supreme Court believed. Nor has this Court held that only narrow portions of its language are an exclusive list of all possible *ex post facto* violations. This Court held again recently—as it has before—that it has never articulated a single "formula" for determining what penal legislation is proscribed as

ex post facto. *California Department of Corrections v. Morales*, 514 U.S. at 509; *accord Beazell v. Ohio*, 269 U.S. at 171.

These conclusions also follow from viewing this Court's *Youngblood* and *Beazell* opinions through a lens of common sense. In *Youngblood* and *Beazell*, the claimed *ex post facto* laws were purely matters of procedure, *i.e.*, mechanics of the adjudicative process—in *Youngblood*, a change in appellate procedure dealing with disposition after a partial reversal; and in *Beazell*, a change in procedure permitting consolidation of trials for good cause. The other criminal case opinions before *Youngblood* in which this Court found there to be no *ex post facto* violation (including the two opinions which *Youngblood* overruled) were to similar effect.

None of this Court's opinions has done anything as extraordinary as the California Supreme Court did in this case, permitting the Legislature to eliminate a complete right to an acquittal by retroactive legislation. Certainly, neither *Youngblood* nor *Beazell* did so, either expressly or by implication.

While the holdings of *Youngblood* and *Beazell* were 100 percent correct, the language of those opinions should be construed with reference to the actual cases that were before this Court. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 399 (1821) [quoted in, *e.g.*, *Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978)]. *Youngblood* and *Beazell* involved mere alterations in modes of procedure, not elimination of a complete legal defense which would have resulted in acquittal.

Here by contrast, in the words of *Beazell*, 269 U.S. at 170, "[t]he quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence," have not "remain[ed] the same." In California, the prosecution always has the burden of proving compliance with the statute of limitations. If the prosecution fails to meet that burden of proof, the trier of fact must return a verdict of not guilty. *People v. Zamora*, 18 Cal.3d 538, 565 n.27, 134

Cal.Rptr. 784, 557 P.2d 75 (1976); *People v. Angel*, 70 Cal.App.4th 1141, 1146-47, 83 Cal.Rptr.2d 222 (1999). Between 1990 and 1997, a jury would have had to find petitioner not guilty on this ground alone; but in 1997, the Legislature retroactively abolished that right to an acquittal. This is a far cry from the mere procedural alterations in *Youngblood* and *Beazell*.

In taking the language "definition of a crime" literally, the California Supreme Court and the other courts which have done the same, *see supra*, p. 9, have used what might be called a "definitional" approach, *i.e.*, that what the California Supreme Court called the "*Beazell* formulation" or "*Youngblood* two-part test" specifically defines every law forbidden as *ex post facto*. *People v. Frazer*, App. A, 21 Cal.4th at 756-57, 760, 763-64. This Court, however, has never adopted such a restrictive approach. As noted above, this Court has stated a functional rather than a definitional approach in its *Ex Post Facto* Clause jurisprudence, and has not limited *ex post facto* analysis to fixed, immutable categories. *See Beazell v. Ohio*, 269 U.S. at 171; *California Department of Corrections v. Morales*, 514 U.S. at 509; *see generally supra*, pp. 6, 7. This Court has used a similarly functional approach in two areas closely related to the *Ex Post Facto* Clause, and has similarly eschewed arguments that these areas should be analyzed through fixed, limited categories. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 475-76 (1977) [Bill of Attainder Clause]; *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 947 (1997) [civil statutory retroactivity]; *Landgraf v. USI Film Products*, 511 U.S. 244, 268-69 & n.23 (1994) [same].

By its overly narrow interpretation of *Youngblood* and *Beazell*, the California Supreme Court adopted what it admitted was a "technical view" of the *ex post facto* prohibition. *People v. Frazer*, App. A, 21 Cal.4th at 763 n.24. This Court has not, however, viewed the *Ex Post Facto* Clause as a mere "technical" provision. Far from it: "The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation," as part of a presumption against retroactive laws that "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our republic." *Lynce v. Mathis*, 519 U.S. 433, 439 & n.12 (1997).

James Madison called *ex post facto* and similar laws "contrary to the first principles of the social compact, and to every principle of sound legislation." The Federalist No. 44 [quoted in *Landgraf v. USI Film Products*, 511 U.S. at 267 n.20].

As discussed *ante*, p. 6, this Court has recognized that "a law that abolishes an affirmative defense," and a retroactive change in a substantive penal law, violate the *Ex Post Facto* Clause. Retroactive abolition of a fully ripe and complete limitations defense, and of the consequent right to an acquittal, is both.

In this case, to use the words of *Beazell*, a 6-year statute of limitations defense was "available under the laws in force at the time of the [alleged] commission" of the offense, late 1984. Granted, at the time of the alleged offense it was only a contingent defense as to petitioner, which wouldn't become noncontingent unless and until the applicable limitations period expired. But the limitations period did expire, and the defense did become noncontingent and unconditional. The 6-year statute of limitations was, by law, a defense existing at the time of the charged offense, which could not be abolished as to petitioner after it became noncontingent and fully ripe. *Cf. Kring v. Missouri*, 107 U.S. 221, 247 (1883) (Matthews, J., dissenting) [legislative repeal of pardon was impermissible *ex post facto* law; but if pardon had been conditional, and had been repealed before all conditions had been satisfied, repeal would not be *ex post facto*].

This Court has recognized the primary concern of the *Ex Post Facto* Clause, that "retroactive punitive measures may reflect 'a purpose not to prevent dangerous conduct generally, but to impose by legislation a penalty against specific persons or classes of persons.'" *Landgraf v. USI Film Products*, 511 U.S. at 267 n.20 [quoting *James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part)]. "The *Ex Post Facto* Clause not only ensures that individuals have 'fair warning' about the effect of criminal statutes, but also 'restricts governmental power by restraining arbitrary and potentially vindictive legislation.'" *Landgraf*, 511 U.S. at 266-67. Many other opinions of this Court also emphasize the Framers' desire to

restrain government and curtail legislative abuses as a key reason for this Clause. *E.g., Miller v. Florida*, 482 U.S. 423, 429-30 (1987); *United States v. Brown*, 381 U.S. 437, 444 n.18 (1965) [quoting James Madison, The Federalist No. 44]; *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87, 137-38 (1810); *Calder v. Bull*, 3 Dall. at 389 (opn. of Chase, J.), 396 (opn. of Paterson, J.), 399-400 (opn. of Iredell, J.). *See also People v. Stevenson*, 416 Mich. 383, 398, 331 N.W.2d 143 (1982) ["[A]ctual or even fictional reliance is not the sole interest protected .... The *ex post facto* principle also protects against erratic or arbitrary action improper in a lawgiver."]; *Warren v. United States Parole Commission*, 659 F.2d 183, 187 (D.C. Cir. 1981) [most significant reason for the *ex post facto* prohibition is to curtail legislative abuses], *cert. denied*, 455 U.S. 950 (1982).

These types of concerns apply to retroactive abolition of any complete defense which otherwise would have resulted in acquittal.[6] Elimination of a complete pardon, immunity or statute of limitations defense is as much a potential means of legislative abuse as abolition of an insanity defense. (If anything, the Framers would have been more concerned about the former. Those legislative practices would have been far more susceptible of retributive abuses than a change in law affecting only politically powerless people in insane asylums.)

The California Supreme Court focused on only one concern of the *Ex Post Facto* Clause, reliance/fair warning. It stated that the intent of the *Ex Post Facto* Clause was to "ensure[] the citizenry has 'fair warning' of the conduct proscribed by law and of the penalties imposed for violating those proscriptions. .... In this way, individuals are free to act in reliance on the law without fear that their conduct will be made punishable in a 'vindictive' or 'arbitrary' fashion after it has occurred." *People v. Frazer*, App. A, 21 Cal.4th at 754. The Court later elaborated: "Statutes governing

---

[6] They also seem particularly *à propos* in a case such as this, where the retroactive legislation singled out one group of persons who had never been convicted of or even charged with a particular crime, based on the nature of the alleged crimes with which they might later be charged.

the time at which a future criminal action may be filed are not enactments on which defendants may reasonably rely in deciding whether to commit an act otherwise defined as criminal . . . ." 21 Cal.4th at 771. These overly narrow recitals of the Clause's purposes yielded an overly narrow view of its scope.

Moreover, the California Supreme Court's reliance theory proves too much, because so many matters of proof that clearly implicate the *ex post facto* prohibition are not based in reliance. For example, defenses such as entrapment, insanity or mistake are not "reliance" defenses; indeed, they often *preclude* any showing of reliance. Yet these non-reliance defenses fall under the *Ex Post Facto* Clause. *Youngblood*, 497 U.S. at 49. There are even some "definitions of crimes" that lack a reliance component, such as involuntary manslaughter, which is generally committed without intent and thus without reliance. Cal. Pen. Code, § 192(b). Yet they too come under the *ex post facto* prohibition. And in most cases, convicted criminals do not actually rely on the elements of any given crime or punishment, because few criminals stop to read statutes and caselaw before committing their crimes. In short, reliance on the definition of a crime or punishment is far from the only interest served by the *Ex Post Facto* Clause, and is not a principled basis to limit that Clause's scope.

Beyond that, criminal statutes of limitations also serve reliance interests. As one very common example, taxpayers often limit retention of tax and financial records to 6 years, the maximum federal criminal statute of limitations. 26 U.S.C. § 6531. (Do taxpayers now need to keep records forever, on the ground that a state or federal Legislature can always extend or abolish the statute of limitations?) As the dissenting Justices in this case put it:

> Statutes of limitations tell people when they no longer need to fear prosecution for crimes which they may or may not have committed. After a statute of limitations for a crime has run, all persons, guilty or innocent, having any reason to anticipate that they might have been subject to prosecution for that crime may throw away

> documents or other items that might have been useful to support a defense, secure in the belief that prosecution is no longer a possibility. Because the self-incrimination privilege does not survive an expired statute of limitations, a person may be forced to testify about a crime in civil proceedings held long after the statute of limitations for the crime has expired. (Fn: Such testimony is particularly likely when the alleged molester is a parent or stepparent. False allegations of child molestation are a not-uncommon phenomenon in bitterly contested child custody proceedings.)

People v. Frazer, App. A, 21 Cal.4th at 780-81 & n.2 (Kennard, J., dissenting). Thus, even if reliance were the only interest underlying the *Ex Post Facto* Clause, which it clearly isn't, that interest encompasses complete limitations defenses as well as other affirmative defenses or "definitions of crimes."

The California Supreme Court thought it significant that a limitations defense accrues only after the alleged commission of an offense, rather than at the time of alleged commission. *People v. Frazer*, App. A, 21 Cal.4th at 763. It is not, for the reasons above.

Moreover, this Court recently rejected such a distinction in *ex post facto* analysis. In *Lynce v. Mathis*, 519 U.S. 433 (1997), Florida made a similar claim, that it could cancel overcrowding credits because Lynce could not reasonably have expected to receive them when he pled *nolo contendere* (*i.e.*, he could not have relied on them). This Court rejected the claim, on the ground that Florida had actually issued the credits, so the retroactive law substantively disadvantaged Lynce by leading to his rearrest and further incarceration. 519 U.S. at 446-47. In *Lynce*, the substantive right existing at the time of the offense—one which affected the State's power of punishment—may have been only contingent at

that time; but once it later became complete and fully ripe, it could not be abolished retroactively. This case should be no different.[7]

In any event, petitioner would submit that—especially in California, and other jurisdictions where a criminal statute of limitations is substantive—retroactive abolition of a complete limitations defense is within at least two of the *Calder v. Bull* categories, the third and fourth. (The third category is included in the California Supreme Court's "*Beazell* formulation" and "*Youngblood* two-part test.") Retroactive abolition of petitioner's complete limitations defense inflicted a greater punishment than the law annexed to the crime when allegedly committed, because under that law, a fully ripe 6-year limitations defense meant the crime could not result in any punishment at all. And retroactive abolition of the complete limitations defense altered the rules of evidence to permit conviction on less or different testimony than the law required at the time of the alleged offense, because evidence of compliance with a 6-year limitations period was required at that time (and continuously after, until the defense became complete), but was not required under the retroactive law. None of this should matter, however, because the *ex post facto* violation is manifest without any reference to fixed categories.

In the end, petitioner seeks a construction of the *Ex Post Facto* Clause that is practical and well grounded in authority, instead of the overly selective and ill-founded construction proffered by the California Supreme Court. Petitioner asks this Court to grant certiorari on Issue One, and reverse the judgment.

---

[7] Recently, this Court faced a similar claim in a civil context. The plaintiff claimed the presumption against statutory retroactivity didn't apply to abolition of a defense to *qui tam* actions, because it didn't (i) create a new cause of action or change an existing one, or (ii) increase the defendant's exposure to damages. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. at 946. This Court rejected the claim, on the ground that the statutory amendment eliminated a defense—which, notably, was another defense that didn't go to the "definition of the [tort] offense" and didn't exist at the time of the alleged wrongful acts. *Id.* at 947-50. The plaintiff's constitutional retroactivity claim in this case should meet with the same fate, for similar reasons.

II. Retroactive Abolition Of Petitioner's Complete Limitations Defense Violated The Due Process Clause

A. Fundamental Fairness

Petitioner certainly concurs with Judge Hand's conclusion. *Falter v. United States*, 23 F.2d at 425-26. He also concurs with the three California Supreme Court Justices who dissented here: "The State of California has an obligation to deal fairly with its citizens. Once it has made an absolute and irrefutable assurance that it will not initiate a prosecution, it may not renege on that promise years afterwards, when memories may have faded and evidence may have been destroyed." *People v. Frazer*, App. A, 21 Cal.4th at 781, 782 (Kennard, J., dissenting); *id.* at 784 (Brown, J., dissenting). Though the dissenters' conclusions of fundamental unfairness rested on the state Due Process Clause, fundamental unfairness equally describes a Fourteenth Amendment violation.

If anything, this should apply with particular force in a jurisdiction such as California, where a criminal statute of limitations is considered substantive; or more importantly, was considered substantive at the time petitioner's statute expired. Our laws since the beginning of the Republic have strongly militated against retroactive legislative deprivation of substantive rights. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. at 265-67.

Until the opinion in this case, the California criminal statutes of limitation put California's citizens on notice that they were potentially subject to prosecution for a certain period of time, and no more. Now, California has deemed that the prior notice doesn't matter for charges of child molestation, and further, that no statute of limitations means what it says because the Legislature can always change it after the fact. What are California's citizens supposed to do? Must they forever keep their tax, financial, and professional records and other contemporaneous documents, now "knowing" that any statute of limitations can be changed at will?

No state is required to adopt criminal statutes of limitation. But if a state does, the law should mean what it says. "To hold otherwise would allow for a dangerous precedent where any limitations period can be rewritten retroactively, thus making the purpose of statutes of limitations meaningless." *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 370 (S.D. 1993). A criminal statute of limitations is supposed to provide predictability, and an irrebuttable presumption of finality beyond a set limit. *United States v. Marion*, 404 U.S. at 322-23. The California Supreme Court opinion permits Legislatures to destroy both at will.

This Court has called retroactive repeal of an immunity "subversive of principles of right and justice." *Cameron v. United States*, 231 U.S. 710, 719 (1914). Retroactive repeal of a substantive statute of limitations, effectively an immunity by operation of law, should be no different in the eyes of the law.

B. "Substantive" And "Procedural" Statutes Of Limitation

With respect to the caselaw, and the issue of "substantive" vs. "procedural" statutes of limitations: Despite criticism in cases such as those cited *supra*, p. 17, this Court has never overruled its cases finding a constitutional violation in post-time bar repeal of a substantive limitations defense, such as *Davis v. Mills* or *William Danzer*. Nor has it placed the restrictions on those cases that some suggest. They remain good authority in their own context, which deals solely with statutes of limitation that are "substantive," *i.e.*, that extinguish a right rather than merely barring a remedy.

The existence of substantive statutes of limitation that qualify rights (in some states, even contract or tort rights), by extinguishing the right at the time bar, was well known to the Anglo-American system when the Constitution was ratified. *See, e.g., Pritchard v. Norton*, 106 U.S. 124, 131-32 (1882); *Baker v. Stonebraker*, 36 Mo. 338, 349-50 (1865). That was and is how many states characterize their statutes of limitation. *See State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d at 369-70; *People v. Frazer*, App. A, 21 Cal.4th at 779 (Kennard, J., dissenting), and cases cited. That is their prerogative, as this Court held in *Chase*

Securities, 325 U.S. at 312-13 & n.9. This Court recently recognized a substantive statute of limitations enacted by Congress in *Beach v. Ocwen Federal Bank*, 523 U.S. 510, 516-17 (1997).

These types of statutes were common with respect to real or personal property. This Court recognized one in the early cases of *Shelby v. Guy*, 11 Wheat. (24 U.S.) 361 (1826) and *Brent v. Chapman*, 5 Cranch (9 U.S.) 358 (1809). But these statutes were not confined to real or personal property. Under these statutes, a defendant acquired a vested right at the time bar; not due to any theory of reliance, but simply because the jurisdiction that created the right considered the claimant's right extinguished at the time bar. That vested a right in the defendant to be free from a claim (effectively a type of immunity), rather than merely depriving the claimant of a remedy. *See, e.g., Baker v. Stonebraker*, 36 Mo. at 349-50 [construing a 1715 statute on enforcement of judgments]; *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Hine*, 25 Ohio St. 629, 633-34 (1874) [wrongful death action]; *Brown v. Parker*, 28 Wis. 21, 27-33 (1871) [contract action]; *Pritchard v. Norton*, 106 U.S. at 130-32; *see also Walsh v. Mayer*, 111 U.S. 31, 37 (1884).

This Court made clear in *Campbell v. Holt* and *Chase Securities* that the Fourteenth Amendment does not *per se* prohibit retroactive revival of time-barred actions; a (procedural) statute of limitations that goes only to remedy can always be changed. But in jurisdictions where a statute of limitations is considered to extinguish a right rather than merely barring a remedy, expiration of that type of limitations period creates a substantive right for the defendant. Deprivation of that right is thus recognized as violating state and federal Due Process guarantees. *State of South Dakota ex rel. Dotson v. Serr*, 506 N.W.2d 421, 423 (1993); *Cole v. National Life Ins. Co.*, 549 So.2d 1301, 1307 (Miss. 1989); *Country Mutual Ins. Co. v. Knight*, 40 Ill.2d 423, 427, 240 N.E.2d 612 (1968); *Ackerman v. Ackerman*, 42 Va. Cir. 103, 107 (1997).

That is the principle for which this Court's opinions such as *Davis v. Mills*, *William Danzer*, and *Stewart v. Keyes* stand. Retroactive abolition of a complete limitations defense is not *per se* a violation of the Fourteenth Amendment, as *Campbell v. Holt*

and *Chase Securities* make clear. But the latter two cases involved statutes of limitations which were deemed procedural, and only to bar the remedy, by the jurisdiction which created the underlying right. "[C]ertainly it cannot be said that lifting the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. *Chase Securities*, 325 U.S. at 314 [emphasis added].

By contrast, when the jurisdiction which creates the right also construes the accompanying statute of limitations as "substantive" and as qualifying the right, so that expiration of the time bar extinguishes the right, that is when cases such as *Davis v. Mills*, *William Danzer* and *Stewart v. Keyes* apply. In those jurisdictions, retroactive abolition of a "substantive" statute of limitations is a violation of the federal Due Process Clause.

This Court has held that whether a statute of limitations is substantive as opposed to procedural, and thus destroys the underlying right rather than merely withdrawing a remedy, depends on the intent of the legislature. *Mid-State Horticultural Co. v. Pennsylvania Ry. Co.*, 320 U.S. 356, 360-61 (1943); *Beach v. Ocwen Federal Bank*, 523 U.S. at 416-17; *see Chase Securities*, 325 U.S. at 312 n.8 [basing its holding on how "the state court . . . construed the relationship between its limitation acts and the state law creating the asserted liability"]. That is the factor which this Court used in *Chase Securities* to distinguish a typical procedural statute of limitations (*Campbell v. Holt/Chase Securities*), from substantive statutes of limitation (*Davis v. Mills/William Danzer*).[8]

---

[8] It also distinguishes some of this Court's recent cases, such as *International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976), and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). In *Robbins & Myers*, retroactive repeal of a time bar was held to be permissible, when there was no indication Congress intended the bar to be substantive. *Turner Elkhorn* held that presumptions in economic legislation must be rational, which is clearly true but doesn't affect the issue here, since not even a rational violation of the Due Process Clause is permissible. These cases do not support the broad theory in cases such as *Shadburne-Vinton*, (continued...)

Chase Securities, 325 U.S. at 312 n.8, 314; *see Davis v. Valley Distributing Co.*, 522 F.2d 827, 830 & n.7 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977); *Chevron Chemical Co. v. Superior Court*, 131 Ariz. 431, 439-40, 641 P.2d 1275 (1982). That makes sense, since protected Fourteenth Amendment liberty and property interests find their source in the law of the jurisdiction that creates them. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Determining whether a statute of limitations is "substantive" or "procedural" is not always easy. Here, however, it is not a problem. It is well established that a California criminal statute of limitations is substantive, and was when petitioner's 6-year time bar—and thus the State's right to prosecute—expired in 1990. *People v. McGee*, 1 Cal.2d at 613-14; *People v. Morris*, 46 Cal.3d at 13; *People v. Zamora*, 18 Cal.3d at 547.

This issue requires looking to the Legislature's intent in enacting the original limitations period. The issue is whether a substantive right inhered in the original legislation (section 800), not in the repealing legislation (section 803(g)); for if a right created in the original legislation vested at the time bar, no later repealing legislation could "undivest" it.[9] In this case, the issue must be examined as of 1990, when the 6-year statute expired, and thus when any right to repose vested. *See People v. Frazer*, App.

---

[8](...continued)
see supra, p. 17, that there are no Due Process consequences to repeal of any complete time bar, whether substantive or procedural.

[9] Also, prior to 1990, the Legislature understood that retroactive revival of time-barred criminal actions would violate *ex post facto* prohibitions. *See* Law Revision Commission Comment to Cal. Pen. Code § 805.5 (1984 enactment). The Legislature rewrote California's criminal statute of limitations laws in 1984, and in so doing, it would not have intended those statutes to have a meaning it believed to be unconstitutional. *In re Rights to Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 349, 158 Cal.Rptr. 350, 599 P.2d 656 (1979). In 1999, the California Supreme Court declared there was no constitutional prohibition against retroactive revival of time-barred criminal actions. But the issue is what the California Legislature intended by enacting statutes of limitation up to 1990, not what it was permitted to do in 1997 or 1999.

A, 21 Cal.4th at 783 (Brown, J., dissenting). The 1990 expiration of the substantive statute of limitations implicates the substantive right line of authority. The Legislature's effort to undo that substantive right seven years later violated the Due Process Clause.

It doesn't matter that a government is not required to make a particular statute of limitations substantive rather than procedural. Once it does, a right to repose vests when the statute expires. The government cannot then take it away. *See Moore v. State*, 43 N.J.L. at 227-29 (opn. of Chancellor Runyon). No more can a government give a conditional gift of $50, allow the condition to be perfected thus making the gift unconditional, then retroactively revoke the gift. The donee need not show he relied on the gift, or collected it as soon as it became unconditional, or even that he has any use for the money. He has a right to it when the last condition is fulfilled. *Twenty Per Cent Cases*, 20 Wall. (87 U.S.) 179, 187 (1873). As a matter of constitutional analysis, this case is no different.

For all of the reasons in this section and in section (A) above, this Court should grant certiorari and hold that retroactive application of section 803(g) violated the Due Process Clause.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated this 3rd day of January, 2000.

Respectfully submitted,

Michael B. Dashjian (Counsel of Record)
Sylvia M. Dashjian
1110 California Blvd. Suite D
(Mailing Address:) P.O. Box 512
San Luis Obispo CA 93406-0512
(805) 460-0300
Counsel for the Petitioner

THE PEOPLE, Plaintiff and Appellant, v. RAYMOND LAWRENCE FRAZER, Defendant and Respondent.

S067443

SUPREME COURT OF CALIFORNIA

21 Cal. 4th 737; 982 P.2d 180; 1999 Cal. LEXIS 5535; 88 Cal. Rptr. 2d 312; 99 Cal. Daily Op. Service 7116; 99 Daily Journal DAR 9017

August 30, 1999, Filed

SUBSEQUENT HISTORY: As Modified October 20, 1999.

PRIOR HISTORY: Mendocino County. Court of Appeal of California, First Appellate District, Division One. A078053. Super. Ct. No. CR24362. Henry K. Nelson, Judge.

DISPOSITION: The judgment of the Court of Appeal is reversed.

COUNSEL: Attorneys for Appellant: Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson and David P. Druliner, Chief Assistant Attorneys General, Robert R. Anderson, Assistant Attorney General, W. Scott Thorpe and Janet Gaard, Assistant Attorneys General, for Plaintiff and Appellant.

Attorneys for Respondent: William T. Rigsby, for Defendant and Respondent.

Charles M. Sevilla and John T. Philipsborn, for California Attorneys for Criminal Justice, as Amicus Curiae on behalf of Defendant and Respondent.

Law Offices of Michael B. Dashjian and Michael B. Dashjian for California Appellate Defense Counsel, as Amicus Curiae on behalf of Defendant and Respondent.

JUDGES: BAXTER, J. WE CONCUR: GEORGE, C.J., WERDEGAR, J., CHIN, J. DISSENTING OPINION BY KENNARD, J. DISSENTING OPINION BY BROWN, J.

OPINION BY: BAXTER

OPINION: [*742] [**182] For many years, the Penal Code[1] has [***2] contained statutes of limitation allowing prosecution of alleged child molesters within a fixed number of years after the crime was committed. (See, e.g., § 800.) Recently, the Legislature added section 803, subdivision (g) (§ 803(g)), to the statutory scheme to permit prosecution of such crimes for an additional period -- within one year of the time the victim reports an independently corroborated crime to law enforcement officials. By its own terms, the new one-year limitations period applies whether the crime occurred before or after section 803(g) became effective. The new law also applies without regard to whether the fixed statute of limitations for the crime has already expired, and had already expired, when section 803(g) took effect.

Pursuant to section 803(g), defendant was charged with violating section 288, prohibiting lewd conduct against children, within one year after the victim reported the crime [***3] to the police. The fixed limitations period in existence when the crime occurred had run before the complaint was filed, and before section 803(g) became effective.

Defendant demurred on grounds section 803(g) constituted an impermissible ex post facto law under the United States and California Constitutions, and unfairly deprived him of a statute of limitations defense under the due process clauses of the United States Constitution. No argument was made that a law increasing the time for filing charges can never target defendants who committed their crimes before the new longer statute of limitations was enacted. Rather, defendant challenged the postcrime statutory change only

---

[1] All further statutory references are to the Penal Code except as otherwise stated.

insofar as it affected individuals who, like [**183] him, were accused of crimes already time-barred under prior law. The trial court sustained the demurrer and dismissed the case. The Court of Appeal affirmed. The People sought review of the judgment in this court.

For reasons we explain, defendant's challenge to section 803(g) cannot prevail under the formula prescribed in *Collins v. Youngblood* (1990) 497 U.S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (*Collins*) for determining when penal [***4] legislation triggers ex post facto protection. With respect to defendant's due process claim, there is no authority specifically authorizing statutes like section 803(g) in criminal cases. However, the United States Supreme Court has rejected analogous attempts to retain the benefit of an expired statute of limitations as a matter of substantive due process. The high court has also indicated that any procedural due process inquiries concerning the timing of a criminal indictment are inherently factual in nature. Based on [*743] these principles, section 803(g) is not unconstitutional per se. We will therefore reverse the judgment.

I. STATUTORY BACKGROUND

California's criminal statutes of limitation were first enacted in 1851 and codified in 1872. The entire scheme, which currently appears in sections 799 through 805.5, was overhauled in 1984. (Stats. 1984, ch. 1270, §§ 1, 2, pp. 4335-4337.) At that time, the Legislature determined that piecemeal amendment over the years had produced a scheme that was confusing, inconsistent, and lacking in cohesive rationale. The 1984 revisions sought to balance the state's interest in barring stale claims against the need to pursue and punish [***5] criminal offenders, particularly in serious cases. (Recommendation Relating to Statutes of Limitation for Felonies (Jan. 1984) 17 Cal. Law Revision Com. Rep. (1984) pp. 307-313 (Statutes of Limitation); see generally, Uelmen, Making Sense out of the California Criminal Statute of Limitations (1983) 15 Pacific L.J. 35.)

There is no statute of limitations for murder, embezzlement of public funds, and certain other offenses punishable by life imprisonment. (§ 799.) Otherwise, felony cases, including those involving sex crimes against children, are generally governed by the limitation periods set forth in sections 800 and 801.

Basically, a felony prosecution must be "commenced" either three years (§ 801) or six years (§ 800) "after commission of the offense," depending upon the term of imprisonment statutorily available as punishment for the crime.[2]

---

[2] Section 800 states: "Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense."

Section 801 states: "Except as provided in Sections 799 and 800, prosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after commission of the offense."

Exceptions to sections 800 and 801 are contained in section 803. According to subdivision (a), section 803 sets forth the exclusive circumstances under which such statutory periods may be "extended" or "tolled." As enacted in 1984, and continuing through the present time, section 803 suspends the running of the statutory period while another prosecution based [*744] on the same conduct is pending against the defendant in state court (id., subd. (b)), delays commencement of the statutory period [***7] for certain offenses involving fraud, theft, and breach of fiduciary duty until the crime is discovered (id., subd. (c)), and suspends, within certain limits, the running of the statutory period while defendant is absent from the state (id., subd. (d)). (See also, id., subd. (e), added by Stats. 1985, ch. 357, § 1, p. 1509 [delaying start of statutory period until certain Water Code and Health and Safety Code violations are discovered].)

Section 804 describes the circumstances under which prosecution is "commenced" to include the time at which a criminal complaint, indictment, or information "is filed." (*Id.*, subds. (a) & (b).) Section 805 makes clear that the "maximum punishment prescribed by statute" determines the applicable [***6] limitations period, and also defines the quoted phrase. (*Id.*, subd. (a).)

Beginning in the late 1980's, lawmakers across the country became increasingly aware that young victims often delay reporting [**184] sexual abuse because they are easily manipulated by offenders in positions of authority and trust, and because children have difficulty remembering the crime or facing the trauma it can cause. Hence, states which traditionally limited the time for prosecuting child molestation in a manner similar to sections 800 and 801 have started to substantially increase the time in which criminal charges can be filed after the assault occurred.[3] Although they operate in a variety of ways, these new statutes generally apply to crimes committed both before and after their enactment. The new longer statutes of [***8] limitation are based on the apparent premise that both past and future sex crimes against children would otherwise go largely unpunished. [***9]

The California Legislature took similar steps when it added subdivision (g) to section 803, effective January 1, 1994. (Stats. 1993, ch. 390, § 1 (the 1994 law or original statute).) As originally

---

[3] Increases by other states in the statutory time for filing criminal charges in child sexual abuse cases, as well as the policies underlying such changes, are well-documented in recent legal writings. (See Adams, Beyond the Reach of the Courts?: The Constitution, Retroactivity, and Childhood Sexual Abuse (1997) 28 Pacific L.J. 796 & fn. 5 (Retroactivity and Childhood Sexual Abuse); Note, Have We Gone Far Enough? Children Who Are Sexually Abused and the Judicial and Legislative Means of Prosecuting the Abuser (1992) 8 St. John's J. Legal Comment. 339, 340-342, 355-357, 363-365; Porto, New Hampshire's New Statute of Limitations for Child Sexual Assault: Is It Constitutional and Is It Good Public Policy? (1991) 26 New Eng. L.Rev. 141, 142-143, 159-162; Comment, Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform (1990) 65 Wash. L.Rev. 189, 190-191, 197, 201-203 (A Model for Reform); Comment, Statute of Limitations for Child Sexual Abuse Offenses: A Time for Reform Utilizing the Discovery Rule (1989) 80 J. Crim. L. & Criminology 842, 843, 859-860 (A Time for Reform); Note, Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Bar to Revival (1989) 22 Indiana L.Rev. 989, 990-997 (Time's No Bar to Revival); see Sagatun and Edwards, Child Abuse and the Legal System (1995) pp. 113-144, 220-223.)

enacted, section 803(g) stated that where certain serious sex offenses were allegedly committed against a victim who was under age 18 at the time, and where the "limitation period specified in Section 800 or 801 has expired," a criminal complaint is nonetheless timely if it is filed "within one year of the date of a report to a law enforcement [*745] agency" by the victim about the crime.[4] Under the literal terms of the 1994 law, the victim could be "any age" at the time the report was made and the extended period in section 803(g) began to run. However, the 1994 statute required "independent evidence that clearly and convincingly corroborates the victim's allegation," and circumscribed the manner in which this standard could be met. (Former § 803(g)(2).) [***10]

Prosecutors promptly invoked the foregoing provisions to file child molestation charges based on the time at which the victim reported the crime, regardless of when the crime occurred or when the statute of limitations otherwise expired. Some lower courts found

---

[4] The version of section 803(g) which took effect January 1, 1994, read in full as follows:

"Notwithstanding any other limitation of time described in [section 799 et seq.], a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261 [rape], 286 [sodomy], 288 [lewd conduct], 288a [oral copulation], 288.5 [continuous sexual abuse], 289 [sexual penetration by foreign object], or 289.5 [fleeing sex offender]. This subdivision shall apply only if both of the following occur:

"(1) The limitation period specified in Section 800 or 801 has expired.

"(2) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation which is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation which would otherwise be inadmissible during trial. Independent evidence shall not include the opinions of mental health professionals."

no statutory or constitutional bar to applying section 803(g) even where the limitations period set forth in section 800 or 801 had expired before January 1, 1994.[5] [***11]

[**185] However, in opinions that were originally published in 1995 and 1996, several Courts of Appeal held that section 803(g), as first enacted, did not apply where prosecution of the crime was otherwise time-barred as of the statute's effective date.[6] This line of cases invoked the general rule disfavoring "retroactive" application of statutes in the absence of a clear [*746] contrary intent.[7] These decisions relied primarily on the absence of explicit language in the 1994 law stating that it "revived" the state's ability to prosecute

---

[5] (*People v. Maloy* (Cal.App.) [Court of Appeal reversed trial court judgment denying prosecutorial motion to reinstate complaint that had been dismissed as time-barred under section 803(g)], review granted November 22, 1995, on April 24, 1997, review dismissed in light of intervening amendments to section 803(g); *Lynch v. Superior Court* (1995) 33 Cal. App. 4th 1223, 1225-1226 (*Lynch*) [trial court overruled defendant's demurrer to complaint as time-barred under section 803(g), but ruling was later vacated on mandate by Court of Appeal], review denied May 25, 1995.)

[6] (*People v. King* (Cal.App.), review granted December 11, 1996, on April 24, 1997, review dismissed in light of intervening amendments to section 803(g); *People v. Sowers* (Cal.App.), review granted March 14, 1996, on April 24, 1997, review dismissed in light of intervening amendments to section 803(g); *People v. Richard G.* (Cal.App.), review granted September 14, 1995, on April 24, 1997, review dismissed in light of intervening amendments to section 803(g); *Lynch, supra,* 33 Cal. App. 4th 1223.)

[7] (See § 3 [stating no provision of the Penal Code "is retroactive, unless expressly so declared"]; *People v. Hayes* (1989) 49 Cal. 3d 1260, 1274, 265 Cal. Rptr. 132, 783 P.2d 719 [stating basic rule of statutory construction that new statutes are "generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise"]; *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1209, 246 Cal. Rptr. 629, 753 P.2d 585 [explaining that general presumption in favor of prospectivity may be overcome by "express language in the statute calling for retroactive application" or "extrinsic sources" making it "very clear" that the Legislature intended such a result].)

defendants against whom the fixed statute of limitations had run before 1994. Some of these Court of Appeal decisions assumed a contrary interpretation would violate ex post facto principles.[8] [***12]

First, the 1996 version retained, without substantive change, all language that had been part of the 1994 law.[9] Thus, according to

---

[8] (*People v. Regules* (Cal.App.), review granted November 16, 1995, on April 24, 1997, review dismissed in light of intervening amendments to section 803(g).)

Judicial reluctance to apply section 803(g) in older child molestation cases did not go unnoticed by the Legislature. [***13] Through an amendment that became operative January 1, 1997, the statute identified in greater detail the cases that could be prosecuted despite delayed reporting of the crime. (Stats. 1996, ch. 130, § 1 (the 1996 amendment or version).)

[9] As a result of the 1996 amendment, language imported wholesale from the original version of section 803(g) was reorganized into newly configured subsections (1) and (2), as follows:

"(1) Notwithstanding any other limitation of time described in [section 799 et seq.], a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.

"(2) This subdivision applies only if both of the following occur:

"(A) The limitation period specified in Section 800 or 801 has expired.

"(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals."

section 803(g)(1), as amended in 1996, a criminal complaint is timely if it is filed no more than "one year" after a victim of "any age" reports to a law enforcement agency that he or she, "while under the age of 18 years," was sexually abused by the defendant. Like its predecessor, the 1996 version applied where the "limitation period specified in Section 800 or 801 has expired." (Former § 803(g)(2)(A).) "Independent evidence" substantiating the victim's [*747] allegation was also still required, and was defined no differently than before. (Former § 803(g)(2)(B).) [***14]

Second, the 1996 amendment added provisions that had not previously appeared in the statute.[10] Critical here is new language [**186] which, as explained later in the opinion, targeted the line of Court of Appeal cases declining to apply section 803(g) in molestation cases that were time-barred before the law came into existence. [***15]

---

[10] Language included for the first time in section 803(g) as a result of the 1996 amendment was placed in subsection (3), as follows:

"(3)(A) Effective July 1, 1997, this subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and if the complaint is filed within the time period specified in this subdivision, it shall revive any cause of action barred by Section 800 or 801.

"(B) Effective January 1, 1997, through June 30, 1997, this subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if either of the following occurs:

"(i) The complaint is filed within the time period specified in this subdivision[, or]

"(ii) The victim made the report required by this subdivision to a law enforcement agency between January 1, 1994, and January 1, 1997, and a complaint was not filed within the time period specified in this subdivision or was filed within the time period but was dismissed, but a complaint is filed or refiled on or before June 30, 1997."

Specifically, the 1996 version made clear that the one-year limitations period set forth in section 803(g) "applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision." (Former § 803(g)(3)(A) & (3)(B).) The 1996 amendment also made explicit the Legislature's intent to "revive any cause of action barred by Section 800 or 801" where the complaint is filed within one year of the time the victim reported the crime to law enforcement officials, as otherwise required by the statute. (Former § 803(g)(3)(A) & (3)(B)(i).)[11] [***16]

An overview of section 803(g) would not be complete without mentioning that the statute was amended a second time, effective June 30, 1997. (Stats. [*748] 1997, ch. 29, § 1 (the 1997 amendment).) The 1997 amendment gave rise to the version of section 803(g) which exists at the present time, and which will be cited throughout the opinion.[12]

---

[11] We note that the 1996 amendment also inserted a special savings clause, appearing in former section 803(g)(3)(B)(ii), and quoted in full in the preceding footnote. This provision gave prosecutors until June 30, 1997 to timely "file" or "refile" a complaint in any child molestation case in which the victim reported the crime to a law enforcement agency between January 1, 1994 and January 1, 1997, and in which the complaint either "was not filed within the [one-year] time period specified in [the statute] or was filed within the time period but was dismissed." (*Ibid.*) By its own terms, the special savings provision that appeared in former section 803(g)(3)(B)(ii) as a result of the 1996 amendment applied regardless of when the crime occurred (i.e., "before, on, or after January 1, 1994"), and even where the effect was to "revive" a prosecution that was otherwise time-barred. (Former § 803(g)(3)(B).)

[12] Section 803(g) currently provides in full as follows:

"(1) Notwithstanding any other limitation of time described in [section 799 et seq.], a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.

"(2) This subdivision applies only if both of the following occur:

(continued...)

[12](...continued)

"(A) The limitation period specified in Section 800 or 801 has expired.

"(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

"(3)(A) This subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs:

"(i) The complaint or indictment was filed on or before January 1, 1997, and it was filed within the time period specified in this subdivision.

"(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision.

"(iii) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was not filed within the time period specified in this subdivision, but a complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

"(iv) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, but a new

(continued...)

[***17] [*749] [**187] In brief, the 1997 amendment did not disturb core provisions authorizing commencement of a prosecution within "one year" of the date of a report to a law enforcement agency by a person of "any age" claiming that he or she was the victim of an enumerated sex crime "while under the age 18 years." (§ 803(g)(1).) The one-year period continues to apply where the "limitation period in Section 800 and 801 has expired," and where "independent evidence" of a clear, convincing, and specified nature supports the victim's claim. (§ 803(g)(2)(A) & (2)(B).) However, the 1997 amendment used a new word -- "California" --

---

[12](...continued)
complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

"(B)(i) If the victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, a new complaint or indictment may be filed notwithstanding any other provision of law, including, but not limited to, subdivision (c) of Section 871.5 and subdivision (b) of Section 1238.

"(ii) An order dismissing an action filed under this subdivision, which is entered or becomes effective at any time prior to 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this section is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first, shall not be considered an order terminating an action within the meaning of Section 1387.

"(iii) Any ruling regarding the retroactivity of this subdivision or its constitutionality made in the course of the previous proceeding, by any trial court or any intermediate appellate court, shall not be binding upon refiling."

to describe the "law enforcement agency" to which the requisite report must be made. (§ 803(g)(1).)

The 1997 amendment also left unchanged language that first appeared in the 1996 version of the statute concerning the state's ability to file criminal charges in cases that were time-barred before 1994. Hence, with respect to any complaint or indictment filed within the one-year period provided therein, the statute "applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action [***18] barred by Section 800 or 801." (§ 803(g)(3)(A).)

In all other respects, the 1997 amendment made changes not directly applicable here concerning cases in which the victim reported the crime after January 1, 1994, and in which a complaint or indictment is filed only after the one-year period in section 803(g) has expired, or in which a complaint or indictment filed within one year of the report is dismissed and later refiled. (§ 803(g)(3)(A)(iii) & (iv), (3)(B)(i)-(iii).) Of particular interest in these provisions, however, is language concerning the timeliness of prosecutions instituted, or reinstituted, within a certain time after an opinion of this court, or the United States Supreme Court, finally decides whether "retroactive application" of the statute "is constitutional." (§ 803(g)(3)(A)(iii) & (iv), (3)(B)(ii), italics added.)[13]

---

[13] Section 803(g) is not the only statute of its kind in California. A similar provision, subdivision (f), was added to section 803 a few years before subdivision (g) was enacted. (Stats. 1989, ch. 1312, § 1, p. 5269.) While section 803(g) concerns the timeliness of child molestation charges based on a police report made by a victim of "any age," including victims who have reached adulthood, subdivision (f) of section 803 provides one year within which to prosecute enumerated sex crimes reported "to a responsible adult or agency" by a victim "under 18 years of age." (*Id.*, subd. (f)(1).) The two provisions differ in certain respects. Subdivision (f) of section 803 does not require independent evidence to corroborate the victim's report. (Cf. § 803(g)(2)(B).) Subdivision (f) of section 803 also stands alone in requiring that "at least one" enumerated sex crime involving the defendant and the victim occur "within the limitation period specified for that crime in either

(continued...)

[***19] [*750] [**188]

II. PROCEDURAL HISTORY

On October 21, 1996, the district attorney filed a complaint in Mendocino County Municipal Court charging defendant with one count of lewd conduct upon a child under age 14 in violation of section 288, subdivision (a) (§ 288(a)), a felony. The crime allegedly occurred 12 years earlier, between October 1, 1984, and December 31, 1984.[14] The underage victim was identified as Jessica F. In addition, the complaint alleged that prosecution of the crime was authorized under section 803(g), which was described as an "exception" to the six-year statute of limitations in section 800. [***20]

Defendant demurred on the ground the action was time-barred under section 800, which "expired as to this charge no later than December 31, 1990." According to defendant, the complaint could not be considered timely under section 803(g) even assuming law enforcement officials received the victim's report no more than

---

[13](...continued)
Section 800 or 801." (§ 803, subd. (f)(2)(B).) However, the one-year period in both provisions applies where the limitations period in section 800 or 801 "has expired." (§ 803, subds. (f)(2)(A) & (g)(2)(A).) Moreover, the 1996 and 1997 amendments to section 803(g) made corresponding changes in subdivision (f) of the same section at the same time. As a result, section 803, subdivision (f)(3) contains express "revival" and "retroactivity" provisions virtually identical to language now under review in section 803(g)(3).

[14] With the exception of a few nonsubstantive changes, section 288(a) has remained the same since 1984, when the crime allegedly occurred, through the present time. Section 288(a) currently states: "Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1 [of the Penal Code], upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

one year earlier. First, defendant asserted, as a matter of statutory interpretation, that the additional one-year limitations period in section 803(g) does not apply where, as here, the six-year period in section 800 had expired before section 803(g) became effective on January 1, 1994. In the alternative, defendant urged that a contrary construction of section 803(g) would violate the ex post facto clauses of the United States and California Constitutions, and the due process clauses of the United States Constitution.

On February 10, 1997, the municipal court sustained the demurrer and ordered the case dismissed. In a written statement of decision, the court reasoned that section 803(g) should be construed in defendant's favor because, as first enacted in 1994, it did not clearly govern actions that were time-barred before its effective date. However, the court [***21] apparently did not consider the 1996 amendment to section 803(g), which became effective 40 [*751] days before the ruling on the demurrer, and which added language bearing on the applicability of the statute in cases such as defendant's. Having resolved the matter in favor of defendant on statutory grounds, the municipal court did not reach the constitutional questions he had raised.

The People promptly moved in superior court to reinstate the complaint. They argued that the 1996 amendment eliminated any ambiguity in the statutory language, and authorized the filing of molestation charges where the statute of limitations had otherwise expired before 1994, and where the victim reported the crime under the requisite circumstances. The People also urged the court to find no constitutional bar to use of section 803(g) in the present case. In opposing the motion, defendant simply renewed all statutory and constitutional arguments previously set forth in the demurrer.

The superior court issued a written ruling adopting the People's construction of the statute. However, the court found that "the clear legislative intent to revive causes of action already barred by statutes of limitation [***22] violates the ex post facto clauses of the United States and/or California Constitutions by changing the

legal consequences of a defendant's past conduct." The motion to reinstate the complaint was denied.

The People appealed. The Court of Appeal affirmed the judgment in a brief opinion that accepted the reasoning used by the superior court in denying reinstatement of the complaint. The Court of Appeal observed that two other appellate courts had invalidated section 803(g) on ex post facto grounds insofar as it applied, on its face, to cases that were time-barred before the law was passed. (*People v. Bunn* (1997) 53 Cal. App. 4th 227, 232-239 [**189] (*Bunn*); *Lynch, supra,* 33 Cal. App. 4th 1223, 1226-1228.) Like *Bunn* and *Lynch,* the court in this case also relied on language in *Falter v. United States* (2d Cir. 1928) 23 F.2d 420, 425-426 (*Falter*), which is discussed later in the opinion. We granted the People's petition for review to address the constitutionality of the statute.

III. APPLICATION OF STATUTE

As a threshold matter, the parties assume here, as on appeal, that section 803(g) applies in the present [***23] case as a matter of statutory construction. Under this reading of the statute, a felony prosecution which otherwise complies with the requirements of section 803(g) is timely whether or not the crime occurred before January 1, 1994, and whether or not the statutory period otherwise applicable under section 800 or 801 expired before January 1, 1994. Based on the "express language" of the statute, and "extrinsic" evidence in the legislative record, we have no doubt the statute operates in this manner. (*Evangelatos v. Superior Court, supra,* 44 Cal. 3d 1188, 1209.)

[*752] At no point has section 803(g) restricted the amount of time that may pass between commission of the crime and commencement of the prosecution. Nor does the statute place any limits on the age of the victim either at the time a report sufficient to trigger the statute is made, or at the time criminal charges based on such a report are filed. Rather, a felony prosecution commenced within one year of a qualifying report is timely under the literal terms of section 803(g)(2)(A) even, indeed only, if the limitations

period otherwise applicable under section 800 or 801 "has expired."

The quoted phrase [***24] obviously ensures that the one-year period in section 803(g)(1) does not override or otherwise conflict with sections 800 and 801 where the victim reports the crime to a qualifying law enforcement agency before the three-year or six-year period set forth in the latter provisions "has expired." In this way, the limitations period in section 803(g) -- like other "tolling" and "extension" provisions in the same statute -- serves to prolong, rather than shorten, the time in which a felony child molestation prosecution may be commenced.

However, nothing in section 803(g) provides that the crime must be committed, or that the limitations period in section 800 or 801 must expire, after January 1, 1994, in order for the extended one-year period to apply. The 1996 amendment left no doubt that section 803(g) applies even where the existing statute of limitations expired before January 1, 1994.

As we have seen, certain Court of Appeal opinions of which the Legislature was presumably aware refused to apply section 803(g) in such cases even where criminal charges were filed within one year of the time the victim reported the underlying crime to law enforcement officials. (Ante, [***25] fn. 6.) This once-published line of authority reasoned that the 1994 law was at least ambiguous insofar as it reflected a legislative intent to "revive" prosecutions that were time-barred under sections 800 and 801 by the time section 803(g) was enacted. Based on the language of the 1996 amendment, the Legislature obviously sought to fill this perceived gap by providing that compliance with the one-year limitations period "revives" the state's ability to file felony charges in "any" action "barred by Section 800 or 801," regardless of whether the crime occurred "before, on, or after January 1, 1994," the initial effective date of the statute. (§ 803(g)(3)(A), italics added.)

Because it explicitly applies in prosecutions of all enumerated sex crimes which occurred at any time "before" January

1, 1994, including "any" crime otherwise "barred" by the statute of limitations, section 803(g) necessarily applies where, as here, the six-year period otherwise applicable under section 800 had expired before January 1, 1994. In order to reach a contrary [*753] conclusion, we would have to read section 803(g) as applying to all covered sex-abuse crimes, regardless of when they occurred, [***26] except in cases in which the limitations period in section 800 or 801 had expired before January 1, 1994. We decline such a tortured construction.

[**190] The legislative history of the 1996 amendment confirms this view. Indeed, the Legislature was highly familiar with the various Court of Appeal opinions filed in 1995 and 1996 that declined to apply section 803(g) where "the previously applicable statute of limitations had expired prior to January 1, 1994 (the effective date of Section 803(g))." (Assem. Floor Analysis, Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 21, 1996, p. 1.) The legislative record identified these Court of Appeal decisions by name and original published citation, and summarized the statutory and constitutional analysis each used to reach this conclusion. (*Id.*, pp. 1-2; Sen. Com. on Crim. Procedure, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 7-9.)

According to the legislative record, the primary reason for amending section 803(g) in 1996 was to repudiate these Court of Appeal decisions insofar as they had construed the statute in such a restrictive manner. The 1996 amendment sought to "clarify," through express "retroactivity" [***27] and "revival" provisions, that section 803(g) permitted charges to be filed within one year of the victim's report, even where prosecution of the crime was otherwise time-barred before January 1, 1994. (Sen. Com. on Crim. Procedure, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 5-7; Sen. Floor Analysis, Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 3, 1996, pp. 2-4.)

Finally, the Legislature considered and rejected the ex post facto concerns cited by some of the targeted Court of Appeal cases as a basis for not applying section 803(g) in a manner consistent

with its underlying intent. Legislative analysts opined that a postcrime increase in the statute of limitations was not the type of criminal legislation prohibited under *Collins, supra*, 497 U.S. 37, even where the limitations period in existence at the time of the crime had already expired. (Assem. Floor Analysis, Assem. Bill No. 2014 (1995-1996 Reg. Sess.) June 21, 1996, pp. 2-3; Assem. Com. on Public Safety, Analysis of Assem. Bill No. 2014 (1995-1996 Reg. Sess.) April 8, 1996, pp. 2-3.)

Thus, consistent with allegations in the complaint, section 803(g) serves as an exception [***28] to section 800 in the present case. We next consider the parties' arguments concerning the constitutionality of this result. [*754]

IV. EX POST FACTO CLAIM

The People do not dispute an assumption made by defendant and the Court of Appeal that section 803(g) operates retroactively because it withdraws a basis for demurrer -- expiration of the statute of limitations under section 800 -- which defendant was entitled to assert before section 803(g) was enacted. (See *Weaver v. Graham* (1981) 450 U.S. 24, 31, 67 L. Ed. 2d 17, 101 S. Ct. 960 [defining retroactive law as "changing the legal consequences of acts completed before its effective date"]; *Tapia v. Superior Court* (1991) 53 Cal. 3d 282, 288, 279 Cal. Rptr. 592, 807 P.2d 434 [same].) The People argue, however, that defendant and the Court of Appeal are mistaken to the extent they maintain that statutes of limitation are a form of penal legislation subject to ex post facto protection even where retroactive expansion of the statutory period occurs. We agree.

The ban on ex post facto legislation[15] stems from the

---

[15] The United States Constitution prohibits Congress (art. I, § 9) and the states (art. I, § 10) from "passing" any "ex post facto law." The California Constitution contains a similar provision (art. I, § 9). We have consistently interpreted the state ex post facto clause no differently from its federal counterparts, viewing United States Supreme Court cases as persuasive (continued...)

excesses of colonial rulers in using retrospective legislation [***29] as a means of [**191] political warfare and retribution. (*Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 388-389, 1 L. Ed. 648 (opn. of Chase, J.) (*Calder*); see Fellman, The Defendant's Rights Today (1976) p. 99.) It ensures the citizenry has "fair warning" of the conduct proscribed by law and of the penalties imposed for violating those proscriptions. (*Weaver v. Graham, supra,* 450 U.S. 24, 28; *Marks v. United States* (1977) 430 U.S. 188, 191, 51 L. Ed. 2d 260, 97 S. Ct. 990.) In this way, individuals are free to act in reliance on the law without fear that their conduct will be made punishable in a "vindictive" or "arbitrary" fashion after it has occurred. (*Weaver v. Graham, supra,* 450 U.S. at p. 29.) [***30]

Early in the nation's history, the United States Supreme Court decided that the ex post facto clause applies only to criminal legislation as opposed to statutes which retroactively affect property, contract, or other interests protected in civil proceedings. (*Calder, supra,* 3 U.S. (3 Dall.) 386, 390-392, [*755] 1 L. Ed. 2d 648, 650-651 (opn. of Chase, J.), 396-397 (opn. of Paterson, J.), 399-400 (opn. of Iredell, J.).) Moreover, in keeping with the original purpose of the framers of the Constitution, only certain criminal legislation is subject to ex post facto protection. (*Beazell v. Ohio* (1925) 269 U.S. 167, 169-171, 70 L. Ed. 216, 46 S. Ct. 68 (*Beazell*); *Calder, supra,* 3 U.S. (3 Dall.) at p. 390 (opn. of Chase, J.).)

---

[15](...continued)
authority on the subject. (*People v. Grant* (1999) 20 Cal. 4th 150, 158, 973 P.2d 72; *Hubbart v. Superior Court* (1999) 19 Cal. 4th 1138, 1171, 969 P.2d 584; *People v. Snook* (1997) 16 Cal. 4th 1210, 1220, 947 P.2d 808; *People v. Helms* (1997) 15 Cal. 4th 608, 614, 936 P.2d 1230; *People v. McVickers* (1992) 4 Cal. 4th 81, 84, 840 P.2d 955; *Tapia v. Superior Court, supra,* 53 Cal. 3d 282, 295-297.) Apparently, because such symmetry exists, defendant has framed his ex post facto challenge to section 803(g) in terms of both the federal and state Constitutions at every stage of the proceedings. For simplicity's sake, this opinion will refer to the applicable ex post facto provisions as a singular item.

According to Beazell, which summarized Justice Chase's definition of ex post facto laws in *Calder*, "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post [***31] facto. The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." (*Beazell, supra,* 269 U.S. 167, 169-170, italics added.)[16] [***32]

---

[16] The foregoing excerpt from *Beazell, supra,* 269 U.S. at pages 169-170, omits from Justice Chase's definition of ex post facto laws in *Calder* any postcrime alteration in "the legal rules of evidence, [that] receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." (3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648.) As we explain above in the text, the high court approved *Beazell*'s formulation of the ex post facto doctrine in *Collins, supra,* 497 U.S. 37, 43. In so doing, *Collins* acknowledged the difference between the *Beazell* and *Calder* tests insofar as postcrime evidentiary changes were concerned, and offered the following explanation: "As cases subsequent to *Calder* make clear, [*Calder*] was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes." (*Collins, supra,* 497 U.S. at p. 43, fn. 3, citing *Hopt v. Utah* (1884) 110 U.S. 574, 588-590, 28 L. Ed. 262, 4 S. Ct. 202.)

We note the high court recently agreed to review a Texas Court of Appeals decision which relied on *Hopt v. Utah, supra,* 110 U.S. 574, to reject an ex post facto challenge to a postcrime statutory change which altered, adversely to the defendant, the evidentiary weight to be placed on testimony by a sexual assault victim, depending upon when the victim first reported the crime. (*Carmell v. State* (Tex.App. 1998) 963 S.W.2d 833, 836, *cert. granted*

(continued...)

More recently, in *Collins, supra,* 497 U.S. 37, 39-40, a convicted sex offender challenged, as ex post facto, postcrime legislation that allowed a state court to summarily correct an unauthorized [*756] sentence on review of the judgment in his case, even though he would have been entitled to a new jury trial under the law in existence at the time of his crime. In rejecting the claim, the United States Supreme Court subjected its ex post facto jurisprudence to close scrutiny, reviewing formulations of the principle from *Calder, supra,* 3 U.S. (3 Dall.) 386, through *Beazell, supra,* 269 U.S. 167, [**192] and into the late 20th century. This review resulted in wholesale endorsement of "the *Beazell* formulation [as] faithful to our best knowledge of the original understanding of the Ex Post Facto Clause." (*Collins, supra,* 497 U.S. at p. 43.) The *"Beazell* formulation" was then distilled into a concise two-part test for use in *Collins* and future cases: "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Ibid.*, italics added.)

After articulating [***33] the controlling standard for resolving ex post facto challenges under the federal Constitution, *Collins* made clear that the two categories of impermissible retroactive legislation -- redefining criminal conduct and increasing punishment -- are exclusive. This critical point was communicated in several different ways.

First, the two-part definition of ex post facto legislation was repeated throughout *Collins* in almost talismanic form. (497 U.S. at pp. 44 [the challenged statute "does not alter the definition of the crime of aggravated sexual abuse, of which [the defendant] was convicted, nor does it increase the punishment for which he is eligible as a result of that conviction"], 49 [approving a case that defined ex post facto laws solely in terms of "altering the definition

---

[16](...continued)
(1999), 119 S. Ct. 2336, 144 L. Ed. 2d 234 [Dock. No. 98-7540; 1999 WL 381069].) The "outcry statute" at issue in *Carmell* -- unlike section 803(g) -- does not appear to operate as a statute of limitations governing the time at which criminal charges may be filed.

of an offense or increasing a punishment"], 50 [disapproving a case that did not define ex post facto laws solely in terms of "alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission' "].)[17]

Second, the high court criticized language in some of its own decisions defining the ex post facto prohibition more expansively to include any "procedural change" which deprives the defendant of " 'substantial protections' " or " 'substantial personal rights' " existing at the time of the crime. [*757] (*Collins, supra, 497 U.S. at p. 45.) Collins* explained that such language was misleading because, whether a retroactive criminal statute is deemed procedural or substantive, it contravenes the ex post facto clause only if it redefines criminal conduct or aggravates punishment. (*Id. at pp. 45-46.) Collins* also expressly overruled two prior decisions that used the ex post facto clause to invalidate state statutes which " ' "altered the situation of a party to his disadvantage" ' " (*id.* at p. 47), but which fell into neither of the two prohibited categories. (*Id.* at pp. 47-52, overruling *Kring v. Missouri* (1883) 107 U.S. 221, 27 L. Ed. 506, 2 S. Ct. 443 [postcrime change in law prevented capital defendant from asserting on retrial that he had been acquitted of first degree murder based on prior [***35] guilty plea to lesser offense of second degree murder]; *Thompson v. Utah* (1898) 170 U.S. 343, 42 L. Ed. 1061, 18 S. Ct. 620 [postcrime reduction in the size of criminal juries].)

---

[17] The high court has closely adhered to *Collins*'s two-prong formula in subsequent cases. (*Lynce v. Mathis* (1997) 519 U.S. 433, 441, 137 L. Ed. 2d 63, 117 S. Ct. 891 [approving *Collins* and explaining it prevents lawmakers from retroactively "altering the definition of criminal conduct or increasing the punishment for the crime"]; *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 504, 131 L. Ed. 2d 588, 115 S. Ct. 1597 [approving *Collins*], 506-507, fn. 3 [explaining that "after *Collins*, the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable"].)

Finally, *Collins, supra*, 497 U.S. 37, clarified that language in *Beazell, supra*, 269 U.S. 167, 169, prohibiting postcrime deprivations of "any defense available according to law at the time when the act was committed," should not be misread as creating a separate or third category of impermissible ex post facto legislation. According to *Collins, supra*, 497 U.S. at page 50, the quoted phrase "was linked [in *Beazell, supra*, 269 U.S. at pages 169-170] to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.' " In other words, the only "defenses" that cannot be restricted or withdrawn for ex post facto purposes are those bearing on the "definition" or "elements" of the charged crime, or involving "an excuse or justification for the [**193] conduct underlying such a charge." (*Collins, supra*, 497 U.S. at p. 50.)[18] [***36] [***37]

A statutory change in the legal effect of the postcrime passage of time does not implicate criminal conduct or punishment as required by *Collins*, [*758] *supra*, 497 U.S. 37. As explained more fully in conjunction with defendant's due process claim, post, statutes of limitation are an optional form of "legislative grace," reflecting a pragmatic determination that the interests of the state are

---

[18] To illustrate this principle, *Collins, supra*, 497 U.S. 37, 49, used the facts in *United States v. Hall* (C.C.D.Pa. 1809) 2 Wash. C. C. 366, 26 F. Cas. 84: "In *Hall*, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo to Portland, Me. As a legal excuse, the defendant argued that a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo. In dicta, Justice Washington hypothesized that, according to the law in effect at the time Hall forfeited the cargo, an 'unavoidable accident' was an affirmative defense to a charge of failing to deliver cargo. His jury instruction then explained that a subsequent law imposing an additional requirement for the affirmative defense -- that the vessel or cargo actually be lost at sea as a result of the unavoidable accident -- would deprive Hall of a defense of his actions available at the time he sold the cargo and thus be an invalid ex post facto law. [P] This analysis is consistent with the *Beazell* framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done."

best served by foregoing prosecution in some cases.[19] Such laws, including California's criminal statutes of limitation, generally seek to protect both the judicial system and the defendant from the burden of litigating claims after a specified time has passed, and after relevant evidence is presumably less reliable or no longer available.[20]

---

[19] (*Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, 314, 89 L. Ed. 1628, 65 S. Ct. 1137 (*Chase*) ["Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. [Citation.] They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. [Fn. omitted.] They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control"]; see 21 Am.Jur.2d, Criminal Law, § 291, pp. 346-347 [describing limitation periods as creatures of statute and noting that, in their absence, a "prosecution may be instituted at any time, however long after commission of the crime"]; *United States v. Marion* (1971) 404 U.S. 307, 322, fn. 14, 30 L. Ed. 2d 468, 92 S. Ct. 455 (*Marion*) [noting that the policies behind civil and criminal statutes of limitation are "similar," and approving the policy statement in *Chase*, *supra*, 325 U.S. 304, 314].)

[20] (Statutes of Limitation, *supra*, 17 Cal. Law Revision Com. Rep., p. 309 ["the statute of limitations is to a large extent a societal determination that after passage of a sufficient length of time, staleness is presumed . . . . [It] acts mechanically to protect a person from further prosecution, regardless of the facts and circumstances of the particular case"]; 2 Robinson, Criminal Law Defenses (1984) § 202(b), p. 465 [describing the statute of limitations as "a nonexculpatory defense" which "bars conviction of an offender even though he may be entirely culpable," and which can "frustrate the community's sense of what justice demands"]; see *Cowan v. Superior Court* (1996) 14 Cal. 4th 367, 372-374, 926 P.2d 438 [concluding that criminal statutes of limitations do not implicate "fundamental" subject matter jurisdiction, and allowing (continued...)

As indicated by the authorities cited in footnotes 19 and 20, ante, the statute of limitations is often said to work in an "arbitrary" or "mechanical" fashion to insulate from prosecution even those individuals whose conduct otherwise satisfied all elements of a penal statute, and who were otherwise subject to criminal punishment, at the time the conduct occurred. [***38]

Here, for instance, the definition of the charged crime has not changed over time. No [***39] material revision in the language of section 288(a) has occurred between 1984, when the crime allegedly took place, and the present time. Indeed, section 288 was enacted in 1901, and the elements [*759] defining criminal conduct [**194] under what is now subdivision (a) have remained the same for decades. (*People v. Martinez* (1995) 11 Cal. 4th 434, 442-446, 903 P.2d 1037 & fns. 5, 7, 8 (*Martinez*); *People v. Scott* (1994) 9 Cal. 4th 331, 342-343 & fn. 5, 885 P.2d 1040.) The crime has long involved " 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*Martinez, supra,* 11 Cal. 4th at p. 452.)[21] [***40]

---

[20](...continued)
defendants to affirmatively waive the issue in order to plead guilty to, or receive instructions on, a time-barred lesser offense].)

[21] In *Martinez, supra*, 11 Cal. 4th 434, the defendant relied on a hypertechnical reading of the statute to argue that, in addition to sexual intent, conviction under section 288(a) requires commission of an inherently "lewd" or intimate act, such as contact involving the genitals, buttocks, or female breast. *Martinez* rejected the claim based on the longstanding judicial view that "the lewd character of an activity cannot logically be determined separate and apart from the perpetrator's intent," and that "the only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances." (11 Cal. 4th at p. 450.) *Martinez* also relied on the Legislature's obvious interest in protecting children from a range of sexually motivated contact broader than that made criminal elsewhere under the statutory scheme. (*Id.* at pp. 442-447, 449-452.) *Martinez* described the considerations relevant to determining whether a statutory violation has occurred in greater detail as follows: "The trier of fact must find
(continued...)

There also has been no relevant change in the punishment prescribed by section 288(a). Now, as in 1984, a base term of imprisonment of "three, six, or eight years" may be imposed where conviction under the statute occurs. (*Ibid.*) Given the unchanged nature of section 288(a) since the time defendant allegedly molested Jessica F., we see no basis on which to conclude that the limitations period in section 803(g) "alters the definition of the [charged] crime" or "increases the [applicable] punishment." (*Collins, supra,* 497 U.S. 37, 44.)

Nevertheless, defendant insists section 803(g) impermissibly deprives him of a " 'defense available according to law at the time when the act was committed.' " (*Collins, supra,* 497 U.S. 37, 42, quoting *Beazell, supra,* 269 U.S. 167, 169.) Defendant observes that when the crime allegedly occurred, section 800 provided immunity from prosecution in the event prosecution did not commence within six years of the charged crime. Alluding to reasoning used by the instant Court of Appeal and other state court cases on which it relied, defendant insists expiration of the limitations period in section [***41] 800 provided [*760] him with a complete defense to criminal liability and punishment which could not later be withdrawn under section 803(g) consistent with ex post facto guarantees. (See *Bunn, supra,* 53 Cal. App. 4th 227, 232-239; *Lynch, supra,* 33 Cal. App. 4th 1223, 1226-1228.)

---

[21](...continued)
a union of act and sexual intent (see § 20), and such intent must be inferred from all the circumstances beyond a reasonable doubt. A touching which might appear sexual in context because of the identity of the perpetrator, the nature of the touching, or the absence of an innocent explanation, is more likely to produce a finding that the act was indeed committed for a sexual purpose and constituted a violation of the statute. On the other hand, if the trier of fact is persuaded beyond a reasonable doubt, from all the circumstances, that the touching of a child was sexually motivated, nothing in the language, history, or purpose of section 288 indicates that the touching should escape punishment simply because it might not be considered a means of sexual gratification by members of the mainstream population." (11 Cal. 4th at p. 452.)

We disagree. As we have explained, the ex post facto clause is concerned exclusively with "the criminal quality attributable to an act" as evidenced "either by the legal definition of the offense or by the nature or amount of the punishment" at the time it occurs. (*Beazell, supra,* 269 U.S. 167, 170, italics added.) The primary purpose of the constitutional guarantee is to ensure that the consequences of a particular course of conduct can be meaningfully assessed in advance, without fear that the rules of criminality and punishment will later change. (*Weaver v. Graham, supra,* 450 U.S. 24, 28-29; *Marks v. United States, supra,* 430 U.S. 188, 191.) For this reason, *Collins* made clear that ex post facto protection extends only to [**195] "defenses" bearing on the "definition" and "elements" of proscribed conduct, or involving [***42] "excuse or justification" for its commission. (497 U.S. 37, 50, 110 S. Ct. 2715, 111 L. Ed. 2d 30.)

Application of section 803(g) to defendant's case in no way violates these principles. The section makes no change in the act or intent elements which the prosecution must prove beyond a reasonable doubt to obtain a conviction under section 288(a), the circumstances which can be used by the defendant to show no lewd touching of an underage child occurred under section 288(a), or the range of state prison sentences available as punishment under section 288(a). Section 803(g) simply provides that where the victim has waited to report a violation of section 288(a) or other enumerated sex crime to a law enforcement agency, and where the limitations period has otherwise expired, there is an additional one-year period in which a criminal complaint may be filed after a qualifying report is made. Section 803(g) regulates the time at which child sexual abuse defined and punished elsewhere in the Penal Code may be charged, but it does not impermissibly withdraw a "defense" as that term of art is used for ex post facto purposes in *Collins, supra,* 497 U.S. 37, 50.[22] [***43]

---

[22] We also disagree with suggestions in *Bunn, supra,* 53 Cal. App. 4th 227, 233-236, and *Lynch, supra,* 33 Cal. App. 4th 1223, 1226-1228, that the manner in which California courts have characterized criminal statutes of (continued...)

In a related vein, defendant argues that even if the state can file charges based on a postcrime "extension" of the statutory period that takes effect [*761] before the statute of limitations in existence at the time of the crime expires, ex post facto principles do not permit postcrime "revivals" of criminal prosecutions that were time-barred before the new longer statute of limitations was enacted. Under this view, since the six-year period set by section 800 had ostensibly run before section 803(g) was enacted and before a complaint charging lewd conduct was filed against defendant, the People could not subsequently use section 803(g) to prosecute defendant in a timely fashion consistent with ex post facto guarantees. Like the Court of Appeal in this case, defendant insists such a conclusion is dictated by *Falter, supra,* 23 F.2d 420, and its progeny. We disagree.

In *Falter*, three defendants were jointly indicted, tried, and convicted for conspiracy to defraud the United States by means of a protracted scheme to buy surplus military goods at fraudulently induced, below-market prices. Writing for a unanimous panel of the Second Circuit Court of Appeals, Judge [***44] Learned Hand addressed the defendants' main claim on appeal at length, and found sufficient evidence of fraudulent activity within the meaning of the federal statute under which charges had been filed. (23 F.2d at pp. 423-425.) Towards the end of the opinion, a series of other legal attacks on the judgment were rejected in relatively succinct terms.

---

[22](...continued)
limitation outside the ex post facto context is relevant to the validity of section 803(g) under *Collins, supra,* 497 U.S. 37. (See *Cowan v. Superior Court, supra,* 14 Cal. 4th 367, 371-374 [describing and disavowing state court cases that indicated trial court has no subject matter jurisdiction over a time-barred criminal offense, and allowing defendants to affirmatively waive the statute of limitations for their own benefit].) Whatever its nature for various state law purposes, either before or after *Cowan*, the statute of limitations is not an "element" of the offense insofar as the "definition" of criminal conduct is concerned. (*Collins, supra,* 497 U.S. at p. 50.) Thus, to the extent section 803(g) alters the statute of limitations applicable to a previously committed crime, it does not implicate the strict "crime and punishment" theory embraced for ex post facto purposes in *Collins*.

Pertinent here is the defendants' claim in *Falter* that prosecution of their conspiracy was barred under the applicable statute of limitations and the ex post facto clause of the federal Constitution.

On the latter issue, the *Falter* court observed that at the time the fraudulent scheme occurred, in late 1919 through early 1920, the applicable statute of limitations permitted commencement of the prosecution within three years of the crime. In November 1921, before the three-year period expired with respect to defendants' crime, the statute of limitations was amended to allow prosecution within a six-year period. (*Falter, supra*, 23 F.2d at p. 425.)

[**196] Without describing the precise nature of the constitutional claim, *Falter* rejected defendants' suggestion that any adverse "change [in the statute [***45] of limitations] after the commission of the crime, and while the [original] time [period] is running," constitutes a violation of the ex post facto clause. (*Falter, supra*, 23 F.2d p. 425.) The court cited language in *Beazell, supra*, 269 U.S. 167, 170, indicating that the ex post facto clause only protects against unfavorable retroactive changes in the [*762] definitions of crime and punishment, and found nothing " 'harsh and oppressive' " in allowing the state to benefit from a postcrime increase in the applicable statutory period. (*Falter, supra*, at p. 425.) *Falter* noted that a 19th century New Jersey court had reached a different result where the statute of limitations existing at the time of the crime "had once run" before an amendment expanding the period was enacted. (*Ibid.*, citing *Moore v. State* (E. & A. 1881) 43 N.J.L. 203.) As emphasized by defendant in the present case, *Falter* then purported to distinguish, in colorful terms, between permissible postcrime "extensions" of a criminal statute of limitations and impermissible postcrime "revivals."[23] [***46]

---

[23] "Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, (continued...)

Defendant recognizes that no decision of the United States Supreme Court or this court has used the foregoing passage from *Falter* to decide an ex post facto question of the sort raised here. Hence, we are not compelled by *Falter* to find a constitutional violation insofar as section 803(g) applies, on its face, to child molestation cases in which section 800 or 801 had expired and no criminal charges were filed before January 1, 1994. On the other hand, defendant asks that we embrace the principles expressed by *Falter* in footnote 23, ante, and adopt such reasoning as our own. Defendant correctly notes that many federal and state courts have cited the relevant passage with approval over the years, as discussed further below.

However, *Falter, supra*, 23 F.2d 420, and its progeny are not persuasive authority for invalidating section 803(g) on ex post facto grounds. Preliminarily, the distinction drawn in *Falter* between permissible and impermissible postcrime expansions in the statute of limitations was unnecessary to the decision in that case. There was no question in *Falter* that the three-year limitations period in existence at the time [***47] of the conspiracy "had not run" at the time the statute was amended and the new six-year period took effect. (23 F.2d at p. 425.) At most, the defendants could be understood as raising an ex post facto challenge based on a postcrime statutory change that increased the time for filing conspiracy charges "while the [three-year] time [period] is running." (*Ibid.*) The *Falter* court correctly rejected such a constitutional challenge based on principles set forth in *Beazell, supra*, 269 U.S. 167. Any question whether the result might have been different if the original limitations period "had once run" prior to amendment of the statute was not pending before the court in *Falter, supra*, 23 F.2d at page 425.

---

[23](...continued)
while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it." (*Falter, supra*, 23 F.2d at pp. 425-426.)

[*763] However, the primary reason we find no ex post facto violation here based on dictum in *Falter*, or on any case cited therein, is that such a result would be inconsistent with *Beazell, supra*, 269 U.S. 167, 169-170, and its modern counterpart, *Collins, supra*, 497 U.S. 37, 43. Statutes regulating the time at which a future criminal prosecution may be filed do not implicate the manner in which [***48] criminal conduct is defined and punished at the time it occurs -- the sole concern of the ex post facto clause. Thus, contrary to what *Falter, supra*, 23 F.2d 420, 425, suggested, it makes no difference for ex post facto purposes whether a postcrime change in the statute of limitations "revives a prosecution already dead" or "gives it a longer lease of life." In neither case does the new expanded statute of limitations "retroactively [**197] alter the definition of crimes or increase the punishment for criminal acts" within the meaning of *Collins, supra*, 497 U.S. 37, 43. (See Retroactivity and Childhood Sexual Abuse, supra, 28 Pacific L.J. 796, 802 [section 803(g) survives ex post facto challenge where prosecution was time-barred before statute was enacted]; Time's No Bar to Revival, *supra*, 22 Indiana L.Rev. 989, 1009-1017 [same general conclusion regarding retroactive expansion of criminal statutes of limitation].)[24] [***49]

---

[24] As noted above, the suggestion in *Falter, supra*, 23 F.2d 420, 426, that ex post facto problems arise from the "unfairness" and "dishonesty" of reviving an already expired limitations period does not comport with the more technical view of ex post facto protection recently confirmed in *Collins, supra*, 497 U.S. 37. But even on *Falter*'s own terms, it is not clear the court in that case would have found unacceptable unfairness with respect to section 803(g). Application of a revived statute of limitations to the special case of child sexual abuse was motivated by strong and reasonable policy considerations. Specifically, in first enacting section 803(g), the Legislature expressed concern that reliable accusations of child sexual abuse, including those accompanied by an admission of guilt, were not prosecuted because the victim -- who may "now [be] an adult" -- had waited to report the crime until after the existing statute of limitations had expired. (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 290 (1993-1994 Reg. Sess.) April 9, 1993, p. 2.) The Legislature recognized that young victims often have difficulty remembering and reporting traumatic abuse at the hands of adults, particularly adults who

(continued...)

We recognize that *Falter, supra*, 23 F.2d 420, 425-426, has been cited with approval by courts in other jurisdictions and in this state, often in cases involving statutes increasing the time for prosecuting child sexual abuse based on acts committed before the statutory change. As noted by the People, however, the vast majority of these decisions reject an ex post facto claim under circumstances similar to those at issue in *Falter* -- unfavorable postcrime change in the statute of limitations involving defendants against [*764] whom the limitations period existing at the time of the crime had not run when the amendment took effect.[25] [***50]

---

[24](...continued)
breach positions of trust, and was obviously concerned that such serious crimes would otherwise go unpunished. As we discuss later in the opinion, the policies underlying section 803(g) strongly influence our conclusion that section 803(g) does not violate due process principles.

[25] (See, e.g., *U.S. v. Grimes* (11th Cir. 1998) 142 F.3d 1342, 1350-1351; *U.S. v. Brechtel* (5th Cir. 1993) 997 F.2d 1108, 1112-1113 & fn. 14; *U.S. v. Taliaferro* (10th Cir. 1992) 979 F.2d 1399, 1402-1403; *U.S. v. Knipp* (6th Cir. 1992) 963 F.2d 839, 842-844; *U.S. v. Madia* (8th Cir. 1992) 955 F.2d 538, 539-540; *Clements v. United States* (9th Cir. 1959) 266 F.2d 397, 398-399 & fn. 4; *U.S. v. Morgan* (D.Conn. 1994) 845 F. Supp. 934, 942-943; *State v. Hirsch* (Neb. 1994) 245 Neb. 31, 511 N.W.2d 69, 76-78; *People v. Russo* (Mich. 1992) 439 Mich. 584, 487 N.W.2d 698, 700-703 & fn. 18; *State v. O'Neill* (Idaho 1990) 118 Idaho 244, 796 P.2d 121, 123-124; *Com. v. Bargeron* (Mass. 1988) 402 Mass. 589, 524 N.E.2d 829, 830; *State v. Creekpaum* (Alaska 1988) 753 P.2d 1139, 1140-1144 & fn. 7; *State v. Hodgson* (Wash. 1987) 108 Wash. 2d 662, 740 P.2d 848, 850-852; *State v. Burns* (Minn.Ct.App. 1994) 524 N.W.2d 516, 519-520; *State v. Nagle* (N.J.Super.Ct.App.Div. 1988) 226 N.J. Super. 513, 545 A.2d 182, 184-185; *People v. Lewis* (1986) 180 Cal. App. 3d 816, 822-823, 225 Cal. Rptr. 782; *People v. Masry* (1986) 179 Cal. App. 3d 1149, 1151-1152, 225 Cal. Rptr. 174; *People v. Sample* (1984) 161 Cal. App. 3d 1053, 1057-1058, 208 Cal. Rptr. 318; *People v. Glowa* (N.Y.Sup.Ct. 1976) 87 Misc. 2d 471, 384 N.Y.S.2d 673, 675-676; *People v. Eitzen* (1974) 43 Cal. App. 3d 253, 265-268, 117 Cal. Rptr. 772; *People v. Snipe* (1972) 25 Cal. App. 3d 742, 746-748, 102 Cal. Rptr. 6; see also *United States ex rel. Massarella v. Elrod* (7th Cir. 1982) 682 F.2d 688, 689; *United States v. Richardson* (3rd Cir. 1975) 512
(continued...)

The conclusion reached by the cases cited in footnote 25, ante, is not inconsistent with our view that application of section 803(g) to defendants whose prosecutions were time-barred before January 1, 1994, does not offend ex post facto guarantees. Not surprisingly, one of the more recent and thoughtful cases in this group seems to depart from *Falter, supra*, 23 F.2d 420, 425-426, and questions whether any retroactive change in the statute of limitations implicates criminal conduct and punishment under *Collins, supra*, 497 U.S. 37.[26] [***51]

[*765] [**198] It appears that few courts have relied on the reasoning of *Falter, supra*, 23 F.2d 420, 425-426, to decide the precise question raised by defendant here, namely, whether federal ex post facto principles bar the Legislature from increasing the time

---

[25](...continued)
F.2d 105, 106; *Christmas v. State* (Miss. 1997) 700 So. 2d 262, 267-268; *State v. Fiorenzano* (R.I. 1997) 690 A.2d 857, 860-861; *State v. Schultzen* (Iowa 1994) 522 N.W.2d 833, 834-835; *State v. Johnson* (Vt. 1992) 158 Vt. 344, 612 A.2d 1114, 1115-1116; *State v. Thill* (N.D. 1991) 468 N.W.2d 643, 647, fn. 8; *State v. Nunn* (Kan. 1989) 244 Kan. 207, 768 P.2d 268, 277-279.)

[26] (*U.S. v. Knipp, supra*, 963 F.2d 839, 843-844 ["Pleading an expired limitations period is certainly a defense in the general sense that it is a defensive measure. More particularly, however, it is a matter in bar of prosecution and as such is distinguishable from a 'pure' defense, which defeats one or more of the elements of the crime. This distinction was noted and strongly reinforced by the Court in [*Collins, supra*, 497 U.S. 37, 50, and *Beazell, supra, 269 U.S. 169-170]* . . . . [P] Thus, 'defense' as used in *Beazell* means a defense related to the definition or elements of the crime. It does not have the much broader meaning assigned to it by defendants, because a plea in bar is not related to the definition of a crime and is not pleaded as a nullification of one or more of its elements or as an excuse or justification for its commission. . . . [P] The defensive use of a statute of limitations is a procedural defense in the nature of a plea in bar. Because it has nothing to do with the internal structure of the crime or its elements, it is not the kind of 'defense' that the Supreme Court was referring to in *Beazell* when it stated that the Ex Post Facto Clause was violated if a defendant was later deprived of a defense that had been available to him at the time he committed the crime in question."].)

for filing criminal charges where the defendant achieved statutory repose before the limitations period was so changed. Our research discloses that courts in no less than five states have found a constitutional violation under such circumstances. In particular, this result has been reached in at least nine opinions -- five from other states,[27] and four from California,[28] including two cases involving section 803(g) and followed by the Court of Appeal here. [***52]

However, most of these decisions predate *Collins, supra,* 497 U.S. 37, while others do not follow *Collins* insofar as it extends ex post facto protection only to laws which retroactively redefine crimes or increase punishment. Because the cases cited in footnotes 27 and 28, ante, are based on an impermissibly broad understanding of ex post facto principles, they provide no meaningful support for defendant's claim.

We conclude that section 803(g) is not an ex post facto law insofar as it applies, on its face, to the instant case. The following decisions are disapproved to the extent they are inconsistent with this view: *Bunn, supra,* 53 Cal. App. 4th 227; [***53] *Lynch, supra,* 33 Cal. App. 4th 1223; *People v. Gordon, supra,* 165 Cal. App. 3d 839; *Sobiek v. Superior Court, supra,* 28 Cal. App. 3d 846.

---

[27] (*Com. v. Rocheleau* (Mass. 1989) 404 Mass. 129, 533 N.E.2d 1333, 1334 [finding ex post facto violation apparently as a matter of both federal and state constitutional law]; *People v. Shedd* (Colo. 1985) 702 P.2d 267, 268 [same]; *State v. Cookman* (Ore. 1996) 324 Ore. 19, 920 P.2d 1086, 1090-1094 [finding ex post facto violation under the state Constitution and using federal ex post facto principles as persuasive authority]; *Com. v. Thek (Pa.Super.Ct. 1988)* 376 Pa. Super. 390, 546 A.2d 83, 88-89 [same], overruled on other grounds in *Com. v. Garcia* (Pa.Super.Ct. 1991) 403 Pa. Super. 280, 588 A.2d 951, 955, fn. 9; *Com. v. Guimento* (Pa.Super.Ct. 1985) 341 Pa. Super. 95, 491 A.2d 166, 167-169 [same].)

[28] (*Bunn, supra,* 53 Cal. App. 4th 227, 232-239; *Lynch, supra,* 33 Cal. App. 4th 1223, 1226-1228; *People v. Gordon* (1985) 165 Cal. App. 3d 839, 849-852, 212 Cal. Rptr. 174, disapproved on other grounds in *People v. Lopez* (1998) 19 Cal. 4th 282, 292, 965 P.2d 713; *Sobiek v. Superior Court* (1972) 28 Cal. App. 3d 846, 848-850, 106 Cal. Rptr. 516.)

V. DUE PROCESS CLAIM

Defendant argues here, as below, that once the six-year period in section 800 had expired as to the charged crime, he could not be prosecuted under section 803(g), as thereafter adopted, consistent with federal due process guarantees. (U.S. Const., 5th & 14th Amends.) He alludes to substantive due process principles applied in civil cases to ensure that "vested" [*766] property rights are not retroactively impaired in an irrational or arbitrary manner. (See generally, *In re Marriage of Bouquet* (1976) 16 Cal. 3d 583, 591-592, 128 Cal. Rptr. 427, 546 P.2d 1371.) In defendant's view, section 803(g) deprives criminal defendants who had achieved statutory repose before January 1, 1994, of an analogous, constitutionally protected interest.

The People vigorously disagree. They observe that the United States Supreme Court has never acknowledged a criminal defendant's fundamental interest, protected by the due process clauses, in retaining the benefit [**199] of [***54] an already expired statute of limitations against subsequent attempts to amend the time at which charges may be filed. According to the People, no decision of any court supports defendant's contrary view.

We agree with the People that defendant is essentially asking this court to invalidate section 803(g) by recognizing a new federal constitutional right based on the assumption that criminal defendants have a fundamental "right to repose," once such repose is achieved under the statute of limitations then in effect. For reasons we explain, the high court all but rejected this view in *Chase, supra,* 325 U.S. 304. Though defendant virtually ignores this significant case, it supports our decision to reject his claim.

In *Chase*, the plaintiff filed suit in Minnesota state court in 1937 to recover the cost of unregistered securities that had allegedly been sold in 1929 in violation of Minnesota statutory and common law. The defendant, a corporation, argued in the trial court that the action was time-barred, and apparently asserted, among other things,

the six-year statute of limitations generally applicable to actions founded upon liabilities created by [***55] statute. The plaintiff disagreed, claiming that the defendant had withdrawn from the state in 1931 and that the running of the statutory period had been suspended during its absence. The trial court rejected the statute of limitations claim on the ground urged by the plaintiff, found an illegal sale of securities under the regulatory scheme, and did not rule on the common law claims. Judgment was entered in the plaintiff's favor.

On appeal, the Minnesota Supreme Court determined that the statute of limitations had not been tolled due to the defendant's absence from the state. The judgment was reversed and, in January 1941, the case was remanded for further proceedings not inconsistent with the latter decision. (*Chase, supra,* 325 U.S. at p. 306.)

While the case was pending in the trial court, the Minnesota Legislature amended the regulatory scheme and included, for the first time, a specific statute of limitations applicable to actions arising thereunder. The effect of [*767] the statutory change, which became operative July 1941, was "to abolish any defense that [the defendant] might otherwise have made under the [more generalized] statutes of limitation" which [***56] had previously governed the challenged sale or which had been applied in its favor in the case. (*Chase, supra,* 325 U.S. at p. 308.)

On remand in the trial court, the defendant argued, among other things, that the new statute of limitations did not apply and that the plaintiff's action was time-barred under prior law. The defendant argued alternatively that to the extent amendment of the regulatory scheme had retroactively expanded the applicable limitations period or withdrawn a statute of limitations bar it had previously been entitled to assert on its behalf, the defendant was deprived of its property in violation of the due process clause of the Fourteenth Amendment. The foregoing claims were rejected by the trial court, which again entered judgment in the plaintiff's favor. The Minnesota Supreme Court affirmed. (*Chase, supra,* 325 U.S. at pp. 308-309.)

The defendant renewed its due process attack on the new statute of limitations in the United States Supreme Court. After noting that "substantial federal questions" had been raised, the court rejected the claim. (*Id.* at p. 311.)

Chase began by summarizing the holding [***57] of *Campbell v. Holt* (1885) 115 U.S. 620, 29 L. Ed. 483, 6 S. Ct. 209 (*Campbell*), the decision on which the Minnesota Supreme Court had relied in rejecting the defendant's federal constitutional claim. "In *[Campbell]*, this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." (*Chase, supra,* 325 U.S. 304, 311-312.) The *Chase* court recognized that "some state courts have not followed [the foregoing rule] in construing provisions of their constitutions similar to the due process [**200] clause." (*Id.* at p. 312.) *Chase* also acknowledged "some criticisms" of *Campbell, supra,* 115 U.S. 620, "in legal literature." (325 U.S. at p. 313.)

Nevertheless, the court refused to overrule *Campbell, supra,* 115 U.S. 620, or otherwise depart from its "essential holding" that federal due process principles [***58] do not preclude the Legislature from making retroactive changes in the applicable limitations period detrimental to the defense. (*Chase, supra,* 325 U.S. 304, 315, 65 S. Ct. 1137; 1143.) In so doing, the court declined to [*768] reexamine or "settle" the ancient debate underlying *Campbell* as to whether limitation periods are prescriptive in nature such that their expiration destroys the attendant legal "right," or whether they merely affect the "remedy" for enforcing such a right. (*Chase* at p. 313.) Instead, *Chase* relied on a more pragmatic view of the statute of limitations that had evolved since *Campbell* was decided, namely, that such laws are instruments of "public policy" existing at the will of the legislature, and that their shelter has never been viewed as a " 'fundamental' right." (*Id.* at p. 314.) *Chase* then denied relief to the defendant under the United States Constitution for the following reasons:

"The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not [***59] be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. Nor has the [defendant] pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where [the defendant's] conduct would have been different if the present rule had been known and the change foreseen. [The defendant] does not say, and could hardly say, that it sold unregistered stock depending upon a statute of limitation for shelter from liability. The nature of the defenses shows that no course of action was undertaken by [the defendant] on the assumption that the old rule would be continued. When the action was commenced, [the defendant] no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time [***60] had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the [defendant] a constitutional right against change of policy before final adjudication. Whatever grievance [the defendant] may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federal constitutional right." (*Chase, supra*, 325 U.S. at pp. 315-316.)

The holding of *Chase* -- that no constitutionally protected interest arises once a statute of limitations has run, and that such protection can be retroactively withdrawn consistent with due process -- has been reaffirmed by the high court in subsequent cases. (See *Plaut v. Spendthrift Farm, Inc.* [*769] (1995) 514 U.S. 211, 229, 131 L. Ed. 2d 328, 115 S. Ct. 1447 [noting that statutes of limitation "can be extended, without violating the Due Process

Clause, after the cause of the action arose and even after the statute itself has expired"]; *Electrical Workers v. Robbins & Myers, Inc.* (1976) 429 U.S. 229, 243, 50 L. Ed. 2d 427, 97 S. Ct. 441 [***61] [rejecting claim that "Congress was without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of a limitations period"].)

We see no meaningful basis on which to distinguish the six-year period in section 800 from the statute of limitations discussed in *Chase, supra,* 325 U.S. 304. That this case involves a criminal, rather than a civil, statute of limitations is not such a persuasive distinction. No provision of the United States Constitution explicitly confers upon [**201] criminal defendants a "right to repose" by virtue of the length of time between commission of the crime and commencement of the prosecution. (See *Doggett v. United States* (1992) 505 U.S. 647, 667-669, 120 L. Ed. 2d 520, 112 S. Ct. 2686 (dis. opn. of Thomas, J.) (*Doggett*) [discussing Sixth Amendment right to speedy trial].) Nor does the federal Constitution itself prescribe a fixed or certain time in which indictment must occur after the crime. (See Adlestein, Conflict of the Criminal Statute of Limitations with Lesser Offenses At Trial (1995) 37 Wm. & Mary L.Rev. 199, 250 & fn. 224 (The Criminal [***62] Statute of Limitations).)[29] [***63]

---

[29] Of course, the Sixth Amendment of the United States Constitution literally guarantees a "speedy" trial to the "accused" once a "criminal prosecution[ ]" is underway. This language has been construed to apply only where the defendant either has been formally and publicly indicted or has been arrested and held to answer on a criminal charge. (*United States v. MacDonald* (1982) 456 U.S. 1, 6-7, 71 L. Ed. 2d 696, 102 S. Ct. 1497; *Marion, supra,* 404 U.S. 307, 313-315, 320-323.) Insofar as it reduces the risk of excessive delay between accusation and trial, the speedy trial guarantee helps protect against oppressive pretrial incarceration, anxiety and concern, and impairment of the ability to defend against the charge. (*Doggett, supra,* 505 U.S. 647, 654-655; *Marion, supra,* 404 U.S. at p. 320.) Courts generally balance four factors "on an ad hoc basis" to determine whether a speedy trial has been denied in a particular case, once the right has attached: length of any delay, reasons for the delay, assertion of the right by the defense, and (continued...)

It is well settled that, aside from procedural due process concerns arising under the Fifth Amendment and involving claims of actual prejudice at trial (see discussion, post), "the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." (*United States v. Ewell* (1966) 383 U.S. 116, 122, 15 L. Ed. 2d 627, 86 S. Ct. 773; accord *United States v. Lovasco* (1977) 431 U.S. 783, 789, 52 L. Ed. 2d 752, 97 [*770] S. Ct. 2044 (*Lovasco*); see *United States v. Gouveia* (1984) 467 U.S. 180, 192, 81 L. Ed. 2d 146, 104 S. Ct. 2292; *United States v. MacDonald, supra,* 456 U.S. 1, 7-8; *Marion, supra,* 404 U.S. 307, 322.) Such statutes provide a measure of predictability "by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (*Marion, supra, 404 U.S. at p. 322,* fn. omitted.)

However, criminal statutes of limitation are no less an act of "policy" or "grace" than their counterparts in civil cases. (*Chase, supra,* 325 U.S. 304, 314.) [***64] The high court has made clear that such laws reflect "legislative assessments of relative interests of the State and the defendant in administering and receiving justice." (*Marion, supra,* 404 U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468.) As in civil cases, such interests include both societal repose and the protection of individuals whose means of defense might be impaired by the passage of time. (*Ibid.*; see *Cowan v. Superior Court, supra,* 14 Cal. 4th 367, 374-375 [identifying the "policy considerations" underlying California's criminal statutes of limitation and finding none to "prevent a defendant from waiving the statute of limitations in this situation"].)

Some states have traditionally provided no statutes of limitation in criminal cases, while many states, including California, do not limit the time for prosecuting certain crimes. (E.g., § 799; see The Criminal Statute of Limitations, supra, 37 Wm. & Mary L.Rev. 199, 250, fn. 223; A Model for Reform, *supra,* 65 Wash. L.Rev.

---

[29](...continued)
prejudice to the defense. (*Barker v. Wingo* (1972) 407 U.S. 514, 530, 33 L. Ed. 2d 101, 92 S. Ct. 2182; accord *Doggett, supra,* 505 U.S. at p. 651.)

189, 191 & fns. 13, 14; A Time for Reform, *supra*, 80 J. Crim. L. & Criminology 842, 845-846.) Criminal statutes of limitation appear no more rooted [***65] in the Constitution or the traditions underlying the American legal system than their civil counterparts.[30] [***66]

[**202] It follows that "whatever grievance [the defense in a criminal case] may have at the change of policy to its disadvantage, it had acquired no immunity [*771] from [prosecution] that has become a federal constitutional right." (*Chase, supra*, 325 U.S. 304, 316.) Under no existing interpretation of substantive due process principles is the Legislature without power to limit or deny a statute of limitations claim in a criminal case after it has been acquired. In light of *Chase, supra*, 325 U.S. 304, a contrary conclusion is foreclosed. (See *State v. Cookman, supra*, 920 P.2d 1086, 1095-1097 (conc. & dis. opn. of Gillette, J.) [amendment

---

[30] By all accounts, criminal statutes of limitation were not part of the English common law. (See *Marion, supra*, 404 U.S. 307, 317; *Doggett, supra*, 505 U.S. 647, 667-668 (dis. opn. of Thomas, J.) [discussing common law rule that " 'time does not run against the king' "]; 21 Am.Jur.2d, Criminal Law, § 291, p. 346.) Thus, while federal and state statutes regulating the time for filing criminal charges have existed since adoption of the United States Constitution, their popularity in this country has been viewed as somewhat of a mystery. (See The Criminal Statute of Limitations, supra, 37 Wm. & Mary L.Rev. 199, 249, fn. 222, 252-256 & fns. 233, 234, 240, 241; Note, The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution (1954) 102 U. Pa. L.Rev. 630, 631-632 & fn. 7.) However, statutes of limitation governing property claims and other civil lawsuits apparently have more ancient roots, and their history has been easier for scholars to trace. (See The Criminal Statute of Limitations, supra, 37 Wm. & Mary L.Rev. 199, 256-257 [noting that English statutes of limitation applicable to actions on realty date from the 13th century and that, in 1623, Parliament enacted a comprehensive statute limiting the time for actions on real property, debt, contract, and torts]; see also *Wood v. Carpenter* (1879) 101 U.S. (11 Otto) 135, 139, 25 L. Ed. 807 [explaining that the 1623 "English statute of limitations of the 21st of James I . . . was adopted in most of the American colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country"].)

increasing time to file child molestation charges does not offend due process insofar as it applies to defendants who achieved repose before statutory period was changed]; Retroactivity and Childhood Sexual Abuse, supra, 28 Pacific L.J 796, 802-804 [section 803(g) does not offend substantive due process guarantees]; Time's No Bar to Revival, supra, 22 Indiana L.Rev. 989, 1014-1019 [same general conclusion regarding retroactive expansion of criminal statutes of limitation].)

The sole [***67] authority cited in support of defendant's federal due process theory are cases resolving analogous claims under the ex post facto clause, as discussed earlier in the opinion. We note that in defendant's brief on the merits in this court, the claim that section 803(g) impairs a "vested" right in violation of substantive due process guarantees is inextricably intertwined with his ex post facto claim. Both arguments share the same headings and textual discussion, and are accompanied by the same case citations.

However, as we have previously explained, the reasoning underlying *Falter, supra,* 23 F.2d 420, and other cases on which defendant relies is flawed. They rest on an expansive view of the ex post facto clause which was disapproved in *Collins,* supra, 497 U.S. 37, 45-52. Under *Collins,* the legislative branch is not prohibited from retroactively expanding a criminal statute of limitations, because neither the definition of criminal conduct nor an increase in punishment is involved. Statutes governing the time at which a future criminal action may be filed are not enactments on which defendants may reasonably rely in deciding whether to commit [***68] act otherwise defined as criminal and subject to punishment under the law in existence at the time.

While defendant focuses for due process purposes on the time at which the limitations period in section 800 or 801 expires, nothing compels or [*772] authorizes this court to find that he acquired a "vested" or "fundamental" right under the United States Constitution with which section 803(g) impermissibly interferes. We decline to invalidate section 803(g) based on a new constitutional

right which, under *Chase, supra,* 325 U.S. 304, the high court has itself refused to embrace.[31]

On the one hand, the United States Supreme Court has indicated that, in addition to various specific protections afforded by the Bill of Rights, the due process clause of the Fourteenth Amendment protects certain "fundamental rights" and "liberty interests," at least where issues of marriage, family, procreation, and certain forms of bodily integrity are concerned. (See *Washington v. Glucksberg* (1997) 521 U.S. 702, 719-720, 138 L. Ed. 2d 772, 117 S. Ct. 2258 [discussing general scope of substantive due process], 728 [finding that "assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause"]; *Reno v. Flores* (1993) 507 U.S. 292, 302-303, 123 L. Ed. 2d 1, 113 S. Ct. 1439 [finding immigration policy placing deportable alien juveniles in custodial care rather than releasing them to unrelated adults implicates no fundamental liberty interest]; *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 847-849, 120 L. Ed. 2d 674, 112 S. Ct. 2791 [describing cases in which substantive due process rights have been recognized]; *Bowers v. Hardwick* (1986) 478 U.S. 186, 190-192, 92 L. Ed. 2d 140, 106 S. Ct. 2841 [discussing general scope of substantive due process and declining to "extend a fundamental right to homosexuals to engage in acts of consensual sodomy"].) On the other hand, the high court has been reluctant to conduct a substantive due process inquiry where the interests at issue are addressed by other more specific provisions of the Constitution. (See *Albright v. Oliver* (1994) 510 U.S. 266, 274, 127 L. Ed. 2d 114, 114 S. Ct. 807 (plur. opn. of Rehnquist, C.J.) [declining to find substantive due process right to be free from criminal prosecution absent probable cause because the 'Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it"]; *Graham v. Connor* (1989) 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865 ["All claims that law enforcement officers have used excessive force --

---

[31] As suggested by the People, we reach no different conclusion even assuming we consider substantive due process principles applied outside the statute of limitations context and *Chase, supra,* 325 U.S. 304.

deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims"].)

Nothing in the foregoing authorities supports defendant's claim that expiration of the statute of limitations in section 800 gives rise to a "fundamental right" which section 803(g) impermissibly seeks to withdraw. Recognition of such a novel right may also be foreclosed to the extent the matter " 'is covered by' " other more specific provisions of the United States Constitution. (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, __ [118 S. Ct. 1708, 1715, 140 L. Ed. 2d 1043].) As we have seen, the ex post facto clause addresses the circumstances under which penal laws, "whatever their form," can be "altered by legislative enactment, after the fact, to the disadvantage of the accused." (*Beazell, supra,* 269 U.S. 167, 170; accord, *Collins, supra,* 497 U.S. 37, 41-43.) And, as we shall discuss, the Fifth Amendment plays at least "a limited role" in regulating the passage of time between the crime and indictment, whether or not the statute of limitations has run. (*Lovasco, supra,* 431 U.S. 783, 789.) [***69]

[*773] [**203] Of course, substantive due process principles preclude arbitrary and capricious legislation even where no fundamental right or liberty interest is at stake. (See *Reno v. Flores, supra,* 507 U.S. 292, 305 ["The impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose"].) Contrary to what defendant claims, section 803(g) is not unconstitutional under this deferential standard insofar as the statute "revives" previously time-barred prosecutions. Indeed, as the legislative history suggests, the statute is based on the assumption that past and future sex crimes against children, even though subject to corroboration by independent evidence, would otherwise go

unpunished given the difficulty young victims experience remembering and reporting such events, and their emotional vulnerability at the hands of adult perpetrators, including those in positions of trust. The means chosen by the Legislature -- allowing prosecution within one year of the official report, inserting express retroactivity and revival provisions, and requiring independent corroboration -- seem particularly [***70] well suited to addressing the serious concerns underlying section 803(g). For all the foregoing reasons, we reject defendant's substantive due process challenge.

Finally, defendant suggests that use of section 803(g) to provide an additional one-year period in which to file child molestation charges where the six-year period in section 800 had expired before January 1, 1994, violates his right to a fair trial under the Fifth Amendment of the United States Constitution. The implication seems to be that, by allowing indictment based on acts committed before January 1, 1988, section 803(g) creates an unacceptable risk that the ability to contest the charge will be impaired by the passage of time. According to defendant, such a result is "fundamentally unfair" and offends procedural due process guarantees. (*Lovasco, supra*, 431 U.S. 783, 796; [**204] see *Medina v. California* (1992) 505 U.S. 437, 443, 120 L. Ed. 2d 353, 112 S. Ct. 2572.)

In *Lovasco*, the defendant was charged in federal court with possessing and selling firearms that had been stolen from the United States mails about 18 months earlier. Although the charges were evidently not time-barred [***71] as a statutory matter, the defendant moved to dismiss the indictment on grounds of unreasonable prejudicial delay. At the ensuing hearing, the defense presented evidence that the prosecution had acquired most of its information in the case by the time a postal inspector's report was prepared one month after the crime. The defendant also established that two witnesses who could have been called on his behalf at trial had since died. On rebuttal, the prosecution explained that the investigation continued even after the postal report was prepared in order to determine whether the weapons had been [*774] supplied by defendant's son, who handled mail at the location from which

they had apparently been stolen. Based on evidence adduced at the hearing, the district court granted the motion to dismiss.

The Eighth Circuit Court of Appeals affirmed. The court did not question the prosecution's stated reason for deferring indictment, namely, to await additional investigation and to determine whether other participants could be linked to the crime. Nevertheless, the ensuing delay was deemed unreasonable since it resulted in the loss of testimony favorable to the defense. In reaching this conclusion, [***72] the appellate court basically adopted the defendant's view that "due process bars prosecution whenever a defendant suffers prejudice as a result of preindictment delay." (*Lovasco, supra,* 431 U.S. at p. 789, 97 S. Ct. 2044.)

The United States Supreme Court reversed. *Lovasco* began by reaffirming the basic principle that due process plays "a limited role" in protecting against "oppressive" preaccusation delay even where no statute of limitations has run. (431 U.S. at p. 789.) The high court confirmed that "proof of actual prejudice" to the defense is necessary to prevail on such a constitutional claim. (*Ibid.*) However, the lower courts erred in *Lovasco* insofar as they assumed that a showing of prejudice was sufficient in this context. The high court made clear that the due process inquiry contemplated by *Lovasco*, and the cases on which it relied, also requires consideration of "the reasons for the delay." (*Id.* at p. 790.)

Lovasco explained that the latter requirement is not satisfied where indictment is postponed after "probable cause" of defendant's involvement in a crime appears, or even after evidence sufficient to prove [***73] his guilt "beyond a reasonable doubt" is obtained. (431 U.S. at pp. 791-792.) Rather, the court held that prejudicial preaccusation delay offends "the Due Process Clause of the Fifth Amendment" when undertaken "solely 'to gain tactical advantage over the accused.' " (*Id.* at p. 795, citing *Marion, supra,* 404 U.S. 307, 324.) For numerous reasons that need not be repeated here, the court explained that a contrary rule could hamper legitimate criminal investigations and unduly interfere with nuanced charging decisions beneficial to both the accused and the administration of justice.

Lowasco declined to describe "in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions," noting that the constitutional rule adopted therein could not be applied outside "the particular circumstances of individual cases." (431 U.S. at pp. 796-797, 97 S. Ct. at [*775] p. 2052.) However, based on the factual record that had been developed in *Lowasco*, the court concluded that it was not "fundamentally unfair" to require the defendant to stand trial. (*Id.* at p. 796.) Notwithstanding any loss of evidence the [***74] defense may have sustained, the record showed only that the government engaged in legitimate efforts to discern the full scope of the criminal enterprise during the 18-month period before charges were filed.

Contrary to what defendant seems to imply, nothing in *Lovasco* or the due process principles on which it relied warrants wholesale invalidation of section 803(g), regardless of when the charged crime occurred [**205] or when the statutory period in section 800 or 801 otherwise expires. As we have seen, prosecutors have wide latitude in conducting criminal investigations and determining whether and when indictments should be filed. Such discretionary decisions offend the United States Constitution only where unfair tactics or improper motives are involved, and where the defendant's ability to refute the charge is materially damaged as a result. As *Lovasco* recognized, no court can make such a determination "in the abstract," without considering "the particular circumstances of [the] individual case[ ]." (431 U.S. 783, 796-797, 97 S. Ct. 2044, 52 L. Ed. 2d 752.)

Because the claim is not "ripe for adjudication" in the present case, we express no opinion on whether, by analogy to principles [***75] set forth in *Lovasco*, defendant's procedural due process rights have been violated by the 12-year lapse between commission of the alleged crime and the filing of the complaint. (431 U.S. at p. 789.) We hold only that, under existing interpretations of the Fifth Amendment, there is no basis on which to facially invalidate section 803(g), either on the ground its one-year limitations period leads to excessive charging delays, or on the ground section 803(g) applies

even where the six-year period in section 800 "has expired."[32]

---

[32] After oral argument, this court requested supplemental briefs from the parties on the validity of section 803(g) under the due process clauses of the state Constitution. (See Cal. Const., art. I, §§ 7, 15.) Defendant suggests these provisions deprive the Legislature of power to "revive" the statute of limitations after it has run in a criminal case. In so doing, he relies exclusively on our venerable decision in *Chambers v. Gallagher* (1918) 177 Cal. 704, 171 P. 931 (*Chambers*), which precluded retroactive application of a new limitations period in a tax matter. The dissenting Justices embrace defendant's state law theory in the present case, reasoning that a criminal defendant possesses an absolute state due process right to repose that, once achieved, necessarily requires invalidation of any law withdrawing such repose, regardless of the particular circumstances of the case. We disagree.

At the outset, we do not necessarily agree with defendant that *Chambers, supra, 177 Cal. 704, applies* here. *Chambers* relied on the California Constitution to hold that the State Controller could not use a new, longer statute of limitations to collect unpaid inheritance taxes where the underlying obligation was already time-barred when the new statute took effect. However, in the eighty years since it was decided, *Chambers* has not been used by any state court to strike down a statute like section 803(g) in a criminal case or in any civil case not involving some form of tax dispute. (See *People v. Universal Film Exchanges* (1950) 34 Cal. 2d 649, 213 P.2d 697; *Tannhauser v. Adams* (1947) 31 Cal. 2d 169, 187 P.2d 716; *Riley v. Howard* (1924) 193 Cal. 522, 226 P. 393; *Riley v. Havens* (1924) 193 Cal. 432, 225 P. 275; *Chambers v. Gibson* (1918) 178 Cal. 416, 173 P. 752; *Nelson v. Flintkote Co.* (1985) 172 Cal. App. 3d 727, 218 Cal. Rptr. 562; *Learner Co. v. County of Alameda* (1965) 234 Cal. App. 2d 278, 44 Cal. Rptr. 535; but see *Carr v. State of California* (1976) 58 Cal.App.3d 139, 147-148 [dictum].) Indeed, several Courts of Appeal have at least implicitly distinguished *Chambers, supra,* 177 Cal. 704, and upheld a civil statute of limitations "reviving" common law causes of action based on childhood sexual abuse. (See Code Civ. Proc., *§ 340.1*; *Tietge v. Western Province of the Servites, Inc.* (1997) 55 Cal. App. 4th 382; *Lent v. Doe (1995) 40 Cal. App. 4th 1177; Liebig v. Superior Court* (1989) 209 Cal. App. 3d 828, 257 Cal. Rptr. 574; see also 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §§ 433-435, pp. 542-546 [suggesting that the scope and viability of *Chambers, supra,* 177 Cal. 704 is "unsettled"].)

(continued...)

[***76] [*776]

VI. DISPOSITION

Section 803(g) is not unconstitutional on any ground asserted by defendant. The judgment of the Court of Appeal is reversed.

BAXTER, J.

WE CONCUR:

GEORGE, C.J.

WERDEGAR, J.

CHIN, J.

DISSENTING OPINION BY KENNARD, J.

DISSENTING OPINION BY BROWN, J.

DISSENTBY: KENNARD; BROWN

DISSENT: DISSENTING OPINION BY KENNARD, J.

---

[32](...continued)

To strike down section 803(g) solely on the ground the Legislature has withdrawn repose after such an expectation has been acquired, without evidence of actual prejudice to the defense, goes far beyond any notion of "fundamental fairness" protected by the due process clauses of the California Constitution. It may be that a defeated expectation of repose, as one factor in a factual showing of substantial prejudice depriving the defendant of a fair trial, could justify a finding that section 803(g) violates state due process principles as applied in a particular case. However, no such claim is made here. For the foregoing reasons, we reject defendant's facial challenge to section 803(g) under the due process clauses of the state Constitution.

After the statute of limitations for a criminal offense has run, may the state prosecute an individual for that offense under a new [**206] law "reviving" the expired limitations period? According to the majority, the state may do so. I disagree. In the oft-quoted words of Judge Learned Hand: "To revive a prosecution already dead" is contrary to "our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest." (*Falter v. United States* (2d Cir. 1928) 23 F.2d 420, 425-426.)

I

On October 21, 1996, the Mendocino County District Attorney filed a complaint in the municipal court charging defendant with one count of child [*777] molestation (Pen. Code, [***77] *§ 288*, subd. (a))[1] allegedly committed 12 years earlier, between October 1 and December 31, 1984.

In 1984, prosecution for the crime defined in section 288, subdivision (a), was limited by a six-year statute of limitations. (Former § 800, subd. (b), as amended by Stats. 1982, ch. 583, § 1, pp. 2543-2544.) That period expired in 1990. But in 1994, 10 years after the alleged commission of the offense in this case, and 4 years after the statute of limitations expired, the Legislature extended the statute of limitations indefinitely. It did so by adding subdivision (g) to section 803 (section 803(g)), providing that a complaint alleging a violation of section 288 (or other specified sexual offenses committed against a minor) may be filed within a year after the alleged victim reports the incident to a law enforcement agency; there is no time limitation for making such reports. Two years later, [***78] in 1996, the Legislature added subpart (3)(A) to section 803(g), stating that a complaint filed under 803(g) "shall revive any cause of action barred by Section 800 . . . ."

---

[1] All subsequent undesignated statutory references are to the Penal Code.

Defendant demurred to the complaint. He argued that the complaint on its face showed that the original six-year statute of limitations had expired long before the Legislature extended the limitations period by enacting section 803(g), and that to charge him with child molestation under the revived statute of limitations violated the ex post facto clauses of the United States and California Constitutions (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9) as well as "the due process clause." The magistrate sustained the demurrer and dismissed the case, ruling that the prosecution violated the federal Constitutional provision barring ex post facto laws. After an unsuccessful attempt in superior court to reinstate the complaint, the People sought review in the Court of Appeal, which affirmed the judgment.

II

Today, California becomes the only jurisdiction, state or federal, to permit "revival" prosecutions under an extended statute of limitations enacted after the expiration of the original [***79] statute of limitations. All other jurisdictions that have addressed the issue have concluded or assumed that these prosecutions violate article I, section 10, clause 1 of the federal Constitution, which provides that "no state shall pass any . . . ex post facto law . . . ." (See, e.g., cases cited in maj. opn., ante, 1999 Cal. LEXIS 5535 at p. *49, fn. 25 and p. *51, fn. 27.) According to the majority, however, the United States Supreme Court's recent decision in *Collins v. Youngblood* (1990) 497 U.S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715, which unlike this case did not involve a statute of limitations, has limited the scope of the ex post facto clause. Therefore, the [*778] majority holds, revival prosecutions no longer violate the ex post facto clause.

If, as the majority concludes, revival prosecutions do not violate the ex post facto clause, two questions remain: do they violate the due process guarantees of either (1) the federal or (2) the state Constitution? The majority devotes considerable time to answering the first question, concluding there is no federal due process violation. But the majority ignores the state due process

question. Because I find the resolution [***80] of this question dispositive here, I, unlike the majority, do not decide the federal constitutional issue.

III

In rejecting defendant's federal due process claim, the majority relies on *Chase Securities* [**207] *Corp. v. Donaldson* (1945) 325 U.S. 304, 89 L. Ed. 1628, 65 S. Ct. 1137 (*Chase Securities*). There, the United States Supreme Court held that revival of a civil cause of action did not violate the due process clause of the Fourteenth Amendment to the federal Constitution. Forty years earlier, the court had reached the same conclusion in *Campbell v. Holt* (1885) 115 U.S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (*Campbell*). In reexamining *Campbell*, the high court in *Chase Securities* noted that many state courts had rejected *Campbell*'s reasoning when construing the due process clauses of their own constitutions: "We are reminded that some state courts have not followed *[Campbell]* in construing provisions of their constitutions similar to the due process clause. Many have, as they are privileged to do, so interpreted their own easily amendable constitutions . . . ." (*Chase Securities, supra,* 325 U.S. at p. 312, [***81] fn. omitted.) Among the many states that did so was California, in *Chambers v. Gallagher* (1918) 177 Cal. 704, 171 P. 931 (*Chambers*).

In *Chambers*, the State Controller sought to collect an inheritance tax under a revived statute of limitations. This court held that the action violated the due process clause of the California Constitution. (*Chambers, supra,* 177 Cal. at p. 708.) We acknowledged that the United States Supreme Court had reached a contrary conclusion in construing the due process clause of the federal constitution in *Campbell, supra,* 115 U.S. 620. But we declined to follow *Campbell*, observing that our conclusion was "supported by the almost universal course of decision in the United States." (*Chambers, supra, 177 Cal. at p. 709.)*

Chambers, supra, 177 Cal. 704, is still good law, and the majority makes no attempt to overrule it. It remains squarely within

the mainstream of [*779] modern judicial thought. The majority of courts in other states in which the issue has arisen have declined to follow the United States Supreme Court's decisions in *Chase Securities v. Donaldson*, 325 U.S. 896, 65 S. Ct. 1561, 89 L. Ed. 2006 (1945), [***82] and *Campbell, supra*, 115 U.S. 620, in construing the due process clauses of their state constitutions, holding that these clauses prohibit a state legislature from reviving time-barred civil actions. As the Rhode Island Supreme Court stated recently: "We are not unmindful that *Campbell* [, *supra*, 115 U.S. 620], *[William] Danzer* [*v. Gulf R.R.* (1925) 268 U.S. 633, 69 L. Ed. 1126, 45 S. Ct. 612], and *Chase* [*Securities, supra*, 325 U.S. 304] remain the foundation stones for the current general federal rule. The state appellate courts, however, are free to interpret and to construe their own state constitutional due process and equal protection provisions. In so doing, the 'great preponderance' of state appellate courts do not apply or follow the general federal rule." (*Kelly v. Marcantonio* (R.I. 1996) 678 A.2d 873, 883; see also *Wiley v. Roof* (Fla. 1994) 641 So. 2d 66, 67-69; *State of Minn. ex rel. Hove v. Doese* (S.D. 1993) 501 N.W.2d 366, 369-370; *Starnes v. Cayouette* (Va. 1992) 244 Va. 202, 419 S.E.2d 669, 671-675; [***83] *Johnson v. Lilly* (Ark. 1992) 308 Ark. 201, 823 S.W.2d 883, 885; *Givens v. Anchor Packing, Inc.* (Neb. 1991) 237 Neb. 565, 466 N.W.2d 771, 773-775; *Colony Hill Condo. I Ass'n v. Colony Co.* (N.C.Ct.App. 1984) 70 N.C. App. 390, 320 S.E.2d 273, 276; *Wilson v. All-Steel, Inc.* (Ill. 1981) 87 Ill. 2d 28, 428 N.E.2d 489, 494-495, 56 Ill. Dec. 897; *Dobson v. Quinn Freight Lines, Inc.* (Me. 1980) 415 A.2d 814, 816; *Zitomer v. Slate* (Md.Ct.Spec.App. 1974) 21 Md. App. 709, 321 A.2d 328, 331, *revd. other grounds sub. nom. Slate v. Zitomer* (Md.1975) 275 Md. 534, 341 A.2d 789; *Haase v. Sawicki* (Wis. 1963) 20 Wis. 2d 308, 121 N.W.2d 876, 878; *Jackson v. Evans* (Ky. 1940) 284 Ky. 748, 145 S.W.2d 1061, 1062; *In re Swan's Estate* (Utah 1938) 95 Utah 408, 79 P.2d 999; *Cathey v. Weaver* (Tex. 1922) 111 Tex. 515, 242 S.W. 447, 453; see also *Orleans Parish School Bd. v. U.S. Gypsum Co.* (E.D.La. 1995) 892 F. Supp. 794, 806-807 [federal court applying Louisiana [***84] law]; *Waller v. Pittsburgh Corning Corp.* (D.Kan. 1990) 742 F. Supp. 581, 583-585 [federal court applying Kansas law].).

Six other states have found legislation reviving time-barred civil actions invalid under other provisions of their Constitutions (*Johnson v. Garlock, Inc.* (Ala. 1996) 682 So. 2d 25, 28; *Doe v. Roman Catholic Diocese* (Mo. 1993) 862 S.W.2d 338, 340-341; *Gould v. Concord Hosp.* (N.H. 1985) 126 N.H. 405, 493 A.2d [**208] 1193, 1195; *Jefferson Cty. Dept. of Soc. Serv. v. D.A.G.* (Colo. 1980) 199 Colo. 315, 607 P.2d 1004, 1005-1006; *Wright v. Keiser* (Okla. 1977) 568 P.2d 1262, 1267; *Ford Motor Company v. Moulton* (Tenn. 1974) 511 S.W.2d 690, 695-696), while some courts have held that legislation reviving a previously dead claim does not violate due process (see cases cited in *Waller v. Pittsburgh Corning Corp., supra,* 742 F. Supp. at p. 584).

All of these decisions involved statutes of limitations in civil cases, as did the high court's decision in *Chase Securities, supra,* 325 U.S. 304, [***85] and this [*780] court's decision in *Chambers, supra,* 177 Cal. 704. I am not aware of any published decision resolving the issue presented here: whether revival of a time-barred criminal prosecution, by legislative extension of the statute of limitations, denies the defendant due process. (See, however, *State v. Cookman* (Or.Ct.App. 1994) 127 Ore. App. 283, 873 P.2d 335, 337-338 [Opinion of three judges of ten-judge panel of intermediate appellate court hearing matter, concluding that revival prosecutions violate due process clause of Fourteenth Amendment; three other judges agreed with the result on other grounds], affd. on other grounds (Or. 1996) 324 Ore. 19, 920 P.2d 1086.) Why this dearth of authority? Certainly not because due process protections apply with greater force in the civil than in the criminal context. To the contrary. In criminal prosecutions, due process requirements are frequently more demanding, because a criminal prosecution places the accused's personal liberty in jeopardy, and, as this court has recognized, "personal liberty is a fundamental interest, second only to life itself, as an interest protected under [the due process [***86] clauses of] the California and United States Constitutions." (*People v. Olivas* (1976) 17 Cal. 3d 236, 251, 131 Cal. Rptr. 55, 551 P.2d 375.) The only reason why until today courts in general have not considered the due process implications of reviving a time-barred criminal prosecution is that, as I have explained (see pp. 2-3, ante),

the courts have held or assumed that such a prosecution violates the federal Constitution's ex post facto clause, thus dispensing with the need to resolve the issue under the due process clause.

Revival of a time-barred criminal prosecution violates the guarantee of "fundamental fairness" that is the essence of the due process protection provided by our state Constitution. (See *People v. Ramos* (1984) 37 Cal. 3d 136, 153, 207 Cal. Rptr. 800, 689 P.2d 430.) As the United States Supreme Court has observed, statutes of limitations "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (*United States v. Marion* (1971) 404 U.S. 307, 322, 30 L. Ed. 2d 468, 92 S. Ct. 455.) Statutes of limitations [***87] tell people when they no longer need to fear prosecution for crimes which they may or may not have committed. After a statute of limitations for a crime has run, all persons, guilty or innocent, having any reason to anticipate that they might have been subject to prosecution for that crime may throw away documents or other items that might have been useful to support a defense, secure in the belief that prosecution is no longer a possibility. Because the self-incrimination privilege does not survive an expired statute of limitations (*Daly v. Superior Court* (1977) 19 Cal. 3d 132, 149, fn. 13, 137 Cal. Rptr. 14, 560 P.2d 1193; *Ex parte Cohen* (1894) 104 Cal. 524, 528, 38 P. 364; see also *Brown v. Walker* (1896) 161 U.S. 591, 598, 40 L. Ed. 819, 16 S. Ct. 644), a person may be forced to testify [*781] about a crime in civil proceedings held long after the statute of limitations for the crime has expired.[2] [***88]

The State of California has an obligation to deal fairly with its citizens. Once it has made an absolute and irrefutable assurance that it will not initiate a prosecution, it may not renege on that promise years afterwards, when memories may have faded and evidence may have been destroyed.

---

[2] Such testimony is particularly likely when the alleged molester is a parent or stepparent. False allegations of child molestation are a not-uncommon phenomenon in bitterly contested child custody proceedings.

The majority here acknowledges that statutes of limitations serve similar interests in [**209] criminal and civil cases. Those interests "include both societal repose and the protection of individuals whose means of defense might be impaired by the passage of time." (Maj. opn., ante, 1999 Cal. LEXIS 5535 at p. *64.) This court implicitly recognized the importance of those interests in *Chambers, supra,* 177 Cal. 704, a civil case holding that the State Controller's action to collect an inheritance tax under a revived statute of limitations violated the due process of the state Constitution. If this is impermissible in a civil case, it should also be impermissible in a criminal prosecution, where the accused's personal liberty is at stake.

The majority, however, takes a different view. Relegating to a mere footnote its cursory comment on the applicability here of this court's decision in *Chambers,* [***89] the majority attempts to distinguish that case by observing that it involves a civil tax dispute. (Maj. opn., ante, 1999 Cal. LEXIS 5535 at p. *75, fn. 32.) The majority's view is untenable. Assume, for instance, that the statute of limitations for bringing a civil suit to collect unpaid taxes and for bringing criminal charges for failing to pay taxes were each five years, and that the Legislature passed laws reviving both statutes of limitations after each had expired. Under the view of the majority, the state's civil tax action would violate the taxpayer's due process rights under the state Constitution, but the state's criminal prosecution of the same taxpayer would not. An odd and unfair result indeed.

The majority also looks to some decisions by our Courts of Appeal as a basis of support for its view here. Those cases upheld the validity of a civil statute of limitations reviving common law causes of action based on childhood sexual abuse, by distinguishing *Chambers, supra,* 177 Cal. 704, on the ground that *Chambers* precludes revival only of statutory and not common law causes of action. (See, e.g., *Liebig v. Superior Court* (1989) 209 Cal. App. 3d 828, 835, 257 Cal. Rptr. 574.) [***90] This court has never addressed the purported distinction. In any event, those decisions have no bearing on [*782] the applicability of *Chambers* in a

criminal case, as here: "In California all crimes are statutory and there are no common law crimes." (*In re Brown* (1973) 9 Cal. 3d 612, 624, 108 Cal. Rptr. 465, 510 P.2d 1017.)

Finally, the high court's decision in *Chase Securities, supra,* 325 U.S. 304, on which the majority bases its rejection of defendant's federal due process claim, provides no basis for us to reconsider our decision in *Chambers, supra,* 177 Cal. 704. "A change in course by the United States Supreme Court, interpreting the federal Constitution, is no justification for a change in this court's interpretation of the distinct provisions of our state Constitution. This court should disabuse itself of the notion that in matters of constitutional law and criminal procedure we must always play Ginger Rogers to the high court's Fred Astaire--always following, never leading. The rights guaranteed by the state Constitution 'are not dependent on those guaranteed by the United States Constitution.' (Cal. Const., art. I, § [***91] 24; see *Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 351-355 [276 Cal. Rptr. 326, 801 P.2d 1077].) We have the power and the duty to give independent meaning and force to the provisions of our state charter." (*People v. Cahill (1993)* 5 Cal. 4th 478, 557-558, 853 P.2d 1037 (dis. opn. of Kennard, J.).)

IV

Today the majority makes California the first and only jurisdiction in this country to allow the prosecution of time-barred criminal offenses under an extended statute of limitations. I cannot join in this holding.

The State of California has an obligation to deal fairly with those it accuses of crimes. By allowing an existing statute of limitations to expire on an alleged offense, the state gives an assurance, which before today was always unconditional, that it will not prosecute for that offense. In my view, the due process guarantee of our state Constitution does not permit the state to withdraw that assurance years later, when recollections of the relevant events may have faded and exculpatory evidence may have been lost or

discarded. Because the offenses of which defendant here is charged became time-barred [**210] before the [***92] Legislature extended the statute of limitations, I would affirm the Court of Appeal's judgment upholding the magistrate's order dismissing the complaint.

KENNARD, J.

I CONCUR:

MOSK, J.

DISSENTING OPINION BY BROWN, J.

I fully concur in Justice Kennard's well-reasoned analysis and conclusion that revival of a criminal statute of limitations [*783] violates our state's constitutional guaranty of due process. (Cal. Const., art. I, §§ 7, 15.) I further agree we should not consider ourselves joined at the hip with the United States Supreme Court in interpreting the California Constitution whose independent vitality this court is charged with preserving. (Cf. *Warden v. State Bar* (August 26, 1999, S060702) 1999 Cal. LEXIS 5533, Cal. 4th (dis. opn. of Brown, J.) [state equal protection provisions should be interpreted independently of federal guaranty].) I write separately to emphasize an additional point on which the majority's holding contravenes the government's obligation to act with fundamental fairness.

Until *Cowan v. Superior Court (1996)* 14 Cal. 4th 367, 374, 926 P.2d 438 (*Cowan*), this court categorically had held that the statute of limitations invokes [***93] fundamental subject matter jurisdiction. (*People v. McGee* (1934) 1 Cal. 2d 611, 613, 36 P.2d 378.) Although a number of other states concluded to the contrary, "in California the statute of limitations constitutes a substantive rather than a procedural right which is not waived by failure to assert it at the pleading stage. If reliability of evidence was the sole factor, certainly a conviction based on a guilty plea would be valid notwithstanding the running of a limitation period. Yet, it is now well settled that a conviction, even if based on a plea of guilty, is

subject to collateral attack if the charge was originally barred by the applicable limitation period. [Citations.]" (*People v. Zamora* (1976) 18 Cal. 3d 538, 547, 134 Cal. Rptr. 784, 557 P.2d 75.) "The point may therefore be raised at any time, before or after judgment." (*People v. McGee, supra,* 1 Cal. 2d at p. 613; *People v. Chadd* (1981) 28 Cal. 3d 739, 757, 170 Cal. Rptr. 798, 621 P.2d 837.) Accordingly, the People had the burden to plead and prove that the prosecution was commenced within the prescribed period (see *People v. Demillo* (1975) 14 Cal. 3d 598, 602, 121 Cal. Rptr. 725, 535 P.2d 1181), [***94] and numerous Courts of Appeal characterized it as an element of the offense. (See *People v. Bunn* (1997) 53 Cal. App. 4th 227, 233.) Although the rule is now modestly tempered (see *People v. Williams* (August 12, 1999, S069793) 1999 Cal. LEXIS 5306, 87 Cal. Rptr. 2d 412, Cal. 4th *Cowan, supra,* 14 Cal. 4th at pp. 374-375), for the most part application of the defense remains absolute.

I have elsewhere expressed my disagreement with this determination. (See *Cowan, supra,* 14 Cal. 4th at pp. 383-393 (conc. and dis. opn. of Brown, J.).) Nevertheless, when the statutory period on the charged offense expired in 1990 and when the Legislature enacted Penal Code *section 803*, subdivision (g), in 1994, defendant could have asserted the limitations defense at any time and could have secured dismissal of the charges or reversal of his conviction.

Now, long after defendant achieved this jurisdictional repose, the majority deprives him of it without a qualm. The possibility defendant may have [*784] committed the offense does not validate the majority's due process transgression. Child molestation will always rank among the most heinous and odious of crimes. The [***95] victims suffer long after completion of the act. Nonetheless, the potential that a guilty person will avoid just punishment is inherent in all statutes of limitations. Society has assumed this loss in exchange for other considerations. (See *People v. Zamora, supra,* 18 Cal. 3d at p. 547; cf. *Wiley v. County of San Diego* (1998) 19 Cal. 4th 532, 541, 966 P.2d 983; *Duckworth v. Eagan* (1989) 492 U.S. 195, 223-224, 106 L. Ed. 2d 166, 109 S. Ct. 2875 (dis. opn. of Marshall, J.); *Abney v. United States* (1977) 431 U.S. 651, 661, 52

L. Ed. 2d 651, 97 S. Ct. 2034 [double jeopardy]; *In re Winship* (1970) 397 U.S. 358, 372, 90 S. Ct. 1068, 25 L. Ed. 2d [**211] 368 (conc. opn. of Harlan, J.) [burden of proof beyond a reasonable doubt]; *Mapp v. Ohio* (1961) 367 U.S. 643, 659, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 [exclusionary rule].) The Legislature has seen fit to change the rules defining the limitations period with respect to child molestation, as well it has authority to do. Applying that change to defendant in these circumstances is another matter, however, and one of constitutional [***96] dimension. Whether or not such application violates the ex post facto prohibition, in my view it most certainly does not comport with California's guaranty of fundamental fairness.

BROWN, J.

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Appellant,

V.

RAYMOND LAWRENCE FRAZER,
Defendant and Respondent.

S067443

Ct. App. 1/1 A078053

Mendocino County
Super. Ct. No. CR24362

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

THE COURT:

The majority opinion herein, appearing at 21 Cal.4th 737, is modified as follows:

At 21 Cal.4th at page 776, footnote 32, the first parenthetical set of citations, beginning with "(See *People v. Universal Film Exchanges*" is modified by adding at the end, just before the final period, the following: "; but see *Carr v. State of California* (1976) 58 Cal.App.3d 139, 147-148 [dictum]."

The modification does not affect the judgment.

First Appellate District, Division One, No. A078053
S067443

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Appellant

V.

RAYMOND LAWRENCE FRAZER, Respondent

Petition for rehearing DENIED.

Mosk, J., Kennard, J., and Brown, J., are of the opinion the petition should be granted.

/s/ George
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,
Plaintiff and Appellant,

V.

RAYMOND LAWRENCE FRAZIER,
Defendant and Respondent.

Docket Number A078053
(Mendocino County Super Ct. No. CR24362)

In October 1996 defendant was charged with lewd and lascivious acts upon a child (Pen. Code, § 288, subd. (a)) committed 12 years earlier, in 1984. At the time the offense was allegedly committed, the limitations period was six years. (Pen. Code, § 800.) In 1994, after the limitations period had expired, the Legislature enacted Penal Code section 803, subdivision (g), (hereafter "section 803(g)"), which extended the limitations period to one year following a report to a law enforcement agency by a person of any age that he or she had been the victim of "substantial" sexual misconduct while under the age of 18.[1] That extension was held to be invalid as an ex

[1] Section 803(g) provided at the time the complaint was filed: "Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. This subdivision shall apply only if both of the following occur: [¶] (1) The limitation period specified in Section 800 or 801 has expired. [¶] (2) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation which is not mutual, and there is

post facto law in *Lynch v. Superior Court* (1995) 33 Cal.App.4th 1223.

Relying on *Lynch*, defendant demurred to the complaint, arguing (1) that as a matter of statutory interpretation section 803(g) did not apply to charges already barred by the statute of limitations and (2) that section 803(g) was unconstitutional as an ex post facto law. The magistrate sustained defendant's demurrer and dismissed the complaint in March 1997.

Effective January 1, 1997, the Legislature amended section 803(g) to declare that the statute is to be applied retroactively. In particular, subpart (3)(B) was added to section 803(g) as follows: "Effective January 1, 1997, through June 30, 1997, this subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if either of the following occurs: [¶] (i) The complaint is filed within the time period specified in this subdivision. [¶] (ii) The victim made the report required by this subdivision to a law enforcement agency between January 1, 1994, and January 1, 1997, and a complaint was not filed within the time period specified in this subdivision or was filed within the time period but was dismissed, but a complaint is filed or refiled on or before June 30, 1997."[2] Citing that

---

independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation which would otherwise be inadmissible during trial. Independent evidence shall not include the opinions of mental health professionals." (Stats. 1994, First Ex. Sess., ch. 46, § 2, No. 9 West's Cal. Legis. Service, p. 4003.)

[2] Section 803(g) was further amended by urgency legislation effective June 30, 1997. (Stats. 1997, ch. 29, § 1. No. 3 West's Cal. Legis. Service, pp. 241-242.)

legislative change, the People then moved to reinstate the complaint. The motion was denied, and the People now appeal.

The parties do not dispute that in its amendment to section 803(g) the Legislature intended to revive the prosecution of charges already barred by the statute of limitations. (See generally *People v. Bunn* (1997) 53 Cal.App.4th 227, 231-232.) The sole question for our review is whether section 803(g) is unconstitutional as an ex post facto law. We conclude that it is.

The federal and the state constitutions each prohibit ex post facto laws. (U.S. Const., art. 1. § 10; Cal. Const., art. 1, § 9.) Both ex post facto clauses are analyzed identically. *(People v. McVickers* (1992) 4 Cal.4th 81, 84, citing *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295.)

In *Collins v. Youngblood* (1990) 497 U.S. 37, the United States Supreme Court eliminated the distinction that had theretofore been made between a substantive and a procedural change in the law. Instead the court clarified that a statute is prohibited by the ex post facto clause if it falls within one of three categories of legislation--one "[I] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ."(Accord, *People v. McVickers, supra,* 4 Cal.4th at p. 84.)

Our focus is on the third category: Does the revival of the right of prosecution after the limitations period has expired deprive the defendant of a defense available according to the law at the time the act was committed?

The Attorney General concedes that California case law, beginning with *Sobiek v. Superior Court* (1972) 28 Cal.App.3d 846, and continuing unanimously thereafter, holds that once the limitations period has expired and prosecution is

barred, a statutory amendment *extending* the limitations period violates the ex post facto clause. (*Lynch v. Superior Court*, *supra*, 33 Cal:App.4th 1223; *Trigg v. Superior Court* (1975) 49 Cal.App.3d 685; 687.)[3] The Attorney General also concedes that in a recent case involving *revival* of charges already barred pursuant the newly-added subpart (3)(B) of section 803(g), the court held the statute to be an ex post facto law. *(People v. Bunn, supra,* 53 Cal.App.4th 227 [review denied].) The Attorney General argues. however, that those cases were decided incorrectly, and the Attorney General urges this court to reach a different conclusion.

We are persuaded by the analysis given by Division Three of this court in *People v. Bunn, supra,* 53 Cal.App.4th 227. All of the Attorney General's arguments are discussed in that opinion, and we find no need to repeat the discussion here. In accordance with that convincing authority, we conclude that defendant cannot be prosecuted for criminal conduct allegedly committed in 1984.

---

[3] The ex post facto clause is not violated, however, if the extension was made before the original limitations period expired. (*People v. Masry* (1986) 179 Cal.App.3d 1149, 1151-1152; *People v. Smith* (1985) 171 Cal.App.3d 997, 1001-1002; *People v. Sample* (1984) 161 Cal.App.3d 1053, 1057; *People v. Swinney* (1975) 46 Cal.App.3d 332, 340 disapproved on another point in *People v. Zamora* (1976) 18 Cal.3d 538, 564, fn. 26.) In the often quoted words of Judge Learned Hand: "Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it." (*Falter v. United States* (2d Cir. 1928) 23 F.2d 420, 425-426.)

The order denying the motion to reinstate the complaint is affirmed.

Dossee, J.

We concur:

Strankman, P.J.

Swager, J.

[File-stamp date: December 22, 1997]

COORDINATED COURTS OF MENDOCINO COUNTY

STATE OF CALIFORNIA, UKIAH BRANCH

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS. Case No. C-24362

RAYMOND LAWRENCE FRAZER,
Defendant.

MINUTE ORDER RULING ON DEMURRER

This matter was before the court on January 7, 1997, for hearing on defendant, Raymond Lawrence Frazer's, demurrer to the complaint filed herein. (Section 1004 Penal Code.) William T. Rigsby , Attorney at Law, was present representing the defendant who has a waiver of personal appearance filed with this court. (Section 977 Penal Code). Elizabeth M. Norman, Deputy District Attorney, representing the People, was not present, having advised the court of her intention to submit the matter on the opposition papers filed herein. Defendant's counsel waived argument and agreed to submit the matter on the moving papers.

Defendant, Raymond Lawrence Frazer, is charged with a violation of section 288(a) of the Penal Code (PC), lewd and lascivious acts with a child under 14 years, occurring between the 1st day of October; 1984 and the 3 1st day of December 1984. The statute of limitations for this offense is six years, as set forth in section 800 PC, and therefore would have expired not later than January 1, 1991. The complaint filed herein on October 21, 1996, more than five years after the limitations expiration, alleges that this case falls under the provisions of section 803(g), effective January 1, 1994, and is therefore an exception to the six year limitation period. Section 803, subdivision (g), specifically provides:

> "Notwithstanding any other limitation of time prescribed in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. This subdivision shall apply only if both of the following occur: (1) The limitation period specified in Section 800 or 801 has expired. (2) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding mutual masturbation which is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegations...."

Counsel, in their moving papers, have argued both the issue of statutory construction and the *Ex Post Facto* clause of the Constitution.

In considering counsels' moving papers, I am guided by the California Supreme Court's holding in Aetna Cas. & Surety Co. v Ind. Acc. Comm. (1947) 30 Cal.2d 388, at 393: "... statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." In accordance with this principle, Section 3, of the California Penal Code specifically provides that: No part of [this Penal Code] is retroactive unless expressly so declared." I have also considered the reasoning of the Appellate Courts in People v. Richard G. (1995) 35 C.A.4th 1099, (review granted S047826) and People v. King (1996) 48 C.A.4th 1134, (review granted S056411). While the court is clearly not bound by the Richard G. and King decisions, the reasoning of the Appellate Courts in such situations, occasionally provides the lower court with some additional insight into the issues. In Richard G., a case which originated in Mendocino County, the Appellate Court noted the People's argument that the wording of Section 803(g)(1) PC expresses a clear legislative intent to revive a Section 800 or 801 PC expired limitations period. However, the Court went on to point out that in their opinion the wording

was intended, not to revive prosecutions where the limitations period expired prior to the enactment of Section 803(g) PC, but to prevent Section 803(g) PC from creating a shorter limitation period than that prescribed by Sections 800 and 801 PC.

After reviewing all of the moving papers and arguments therein and the recent case law I am inclined to believe that, absent clear and express legislative intent in the statute, and the differing reasonable interpretations possible, we must be bound by the general legal principle noted above and set forth again in Tapia v. Superior Court (1991) 53 Cal.3d 282, 287, "It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retroactivity ... (citations.)" This principle, when considered in light of the fact that the Legislature was acting after asking for and receiving an opinion from the Office of Legislative Counsel of California which advised: "If Assembly Bill 638 of the 1991-92 Regular Session becomes operative, the constitutional provisions prohibiting ex post facto laws would prohibit the filing of a criminal complaint pursuant to Section 803 of the Penal Code, as amended by the bill, if the previously applicable statute of limitations has expired prior to January 1, 1993, the effective date of the bill." (Ops. Cal. Legis. Counsel, No. 29534, Oct 2, 1992, page 1.) With such legal advice in hand, it would seem that the Legislature, if they chose to ignore that advice, would have taken steps to be exceptionally clear in expressing a retroactive intent. It doesn't appear to me that they took such steps and therefore I believe that Section 803(g) PC, enacted with an effective date of January 1, 1994, applies only to prosecutions commenced after the effective date of the statute and in cases where the statute of limitation had not expired prior to that effective date. I believe such a finding is in accord also with the legal principal set forth in People v. Superior Court (Douglass) (1979) 24 Cal.3d 428, 435, "When the statute is susceptible of two reasonable constructions ... the defendant is ordinarily entitled to that construction most favorable to him."

While we may wish it were different in light of the extreme vulnerability of the victims in these cases, based on the above findings in respect to statutory construction, I do not believe the court needs to address the *ex post facto* issue, and the defendant's demurrer is sustained.

Dated: February 10, 1997

Donald R. Combest, Judge

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MENDOCINO

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,

VS.

RAYMOND LAWRENCE FRAZER,
Respondent.

CR24362

RULING ON MOTION TO REINSTATE COMPLAINT PURSUANT TO PC 871.5

This matter came on for hearing in this court March 11, 1997, on the prosecution's Motion to Reinstate the Complaint after the granting of a demurrer and dismissal in the Municipal Court. The prosecution's motion in this court is brought pursuant to the provisions of Penal Code Section 871.5.

Defendant was represented in this court by attorney William Rigsby and the People by Elizabeth Norman. The matter was submitted on the moving papers.

The facts are that the defendant, Raymond Lawrence Frazer, is charged with a violation of 288(a) of the Penal Code, lewd and lascivious acts with a minor under fourteen years, occurring between the 1st of October 1984 and the 31st of December 1984. Penal Code Section 800 articulates that the limitations period for this offense is 6 years, and jurisdiction would therefore have expired not later than January 1, 1991.

This motion was first brought by the defendant in the Municipal Court on December 17, 1996, and the matter was

taken under submission on January 7, 1997. The magistrate's decision is dated February 10, 1997.

Apparently, between the filing of the demurrer which asserts the statute of limitations as a defense, and the rendering of the magistrate's decision, an amendment of the statue [sic] took effect in the form of 803(3)(B), which is cited by the prosecution for the first time in their moving papers in this court. That section states:

> "Effective January 1, 1997, through June 30, 1997, this subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if either of the following occurs ..."

The ruling of the magistrate in granting the demurrer and dismissing the complaint was based on a statutory construction of Penal Code Section 803g which became effective on January 1, 1994. He concluded that under the generally accepted principles of statutory construction, absent a clear and express legislative intent that the statute be applied retroactively, it must be applied prospectively. In holding that the legislature failed to clearly articulate an intention that 803g be applied retroactively, the magistrate relied on cases that interpreted the statute before 803g(3)(B) took effect.

In ruling on the prosecution's motion brought pursuant to 871.5, this Court is limited to hearing and determining the motion on the basis of the record before the magistrate, and the only ground for the motion shall be whether, as a matter of law, the magistrate erroneously dismissed the action.

The answer is no, notwithstanding that it appears clear by the 803g(3)(B) amendment that the legislature has now clearly signaled its intention that 803g be applied retroactively. The dismissal by the magistrate was correct, but prospective statutory construction is no longer the issue. The issue now is

whether the clear legislative intent to revive causes of action already barred by statutes of limitation violates the ex post facto clauses of the United States and/or California Constitutions by changing the legal consequences of a defendant's past conduct.

The United States Supreme Court has provided a clear standard on this issue in *Collins vs. Youngblood*, (1990) 497 US 37, wherein the Court stated in part that a statute which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.

The People argue here, as they did in *Lynch vs. Superior Court*, 33 CA4th 1223, that section 803g does not deprive a defendant of a right or defense "available at the time" the offense was allegedly committed. The Lynch Court expressly rejected that contention and held that a statute of limitation defense is fixed or defined as of the date of the offense, but its assertion is premature until the occurrence of a later contingency.

This reasoning is in line with well-settled law as articulattd in *Sobiek vs. Superior Court*, 28 CA3d 846, wherein the Court held that a criminal statute of limitations period in effect on the date of the alleged offense may lawfully be extended before, but not after, it has run as to the offense.

The application of Penal Code Section 803g as applied to this defendant is a violation of ex post facto provisions of the United States and/or California Constitutions. **The Motion To Reinstate The Complaint is denied**.

Dated: 3/27/97

HENRY K. NELSON
JUDGE OF THE SUPERIOR COURT

cc: DDA Elizabeth Norman
William Rigsby, Esq.

Section 288. Lewd or lascivious acts; penalties; psychological harm to victim

(a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

Section 800. Offenses punishable by imprisonment for eight years or more

* * * [P]rosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense.

Section 803. Tolling or extension of time periods; revival of cause of action

* * *

(g)(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5 [felony sex crimes].

(2) This subdivision applies only if both of the following occur:

(A) The limitation period specified in Section 800 or 801 has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

(3)(A) This subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs:

(i) The complaint or indictment was filed on or before January 1, 1997, and it was filed within the time period specified in this subdivision.

(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision.

(iii) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was not filed within the time period specified in this subdivision, but a complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

(iv) The victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, but a new complaint or indictment is filed no later than 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this subdivision is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first.

(B)(i) If the victim made the report required by this subdivision to a law enforcement agency after January 1, 1994, and a complaint or indictment was filed within the time period specified in this subdivision, but the indictment, complaint, or subsequently filed information was dismissed, a new complaint or indictment may be filed notwithstanding any other provision of law, including, but not limited to, subdivision (c) of Section 871.5 and subdivision (b) of Section 1238.

(ii) An order dismissing an action filed under this subdivision, which is entered or becomes effective at any time prior to 180 days after the date on which either a published opinion of the California Supreme Court, deciding the question of whether retroactive application of this section is constitutional, becomes final or the United States Supreme Court files an opinion deciding the question of whether retroactive application of this subdivision is constitutional, whichever occurs first, shall not be considered an order terminating an action within the meaning of Section 1387.

(iii) Any ruling regarding the retroactivity of this subdivision or its constitutionality made in the course of the previous proceeding, by any trial court or any intermediate appellate court, shall not be binding upon refiling.

Supreme Court, U.S.
FILED
MAR 30 2000
CLERK

No. 99-1193

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

RAYMOND L. FRAZER, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
W. SCOTT THORPE
Supervising Deputy Attorney General
JANET GAARD
Special Assistant Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5284
Fax: (916) 324-2960
Counsel for Respondent

QUESTIONS PRESENTED

1. Did the California Supreme Court properly interpret *Collins v. Youngblood*, 497 U.S. 37 (1990) to find the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the previously-applicable statute of limitations, does not violate the Ex Post Facto Clause?

2. Did the California Supreme Court properly find the California Legislature's revival of a time-barred criminal case, by a retroactive law enacted after the expiration of the statute of limitations, did not violate the Due Process Clause?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONS AND STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
ARGUMENT	4
THE CALIFORNIA SUPREME COURT PROPERLY INTERPRETED *COLLINS V. YOUNGBLOOD*, 497 U.S. 37 (1990) TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE EX POST FACTO PRINCIPLES	4
A. *Collins v. Youngblood* Is A Clear And Unambiguous Statement Of The Law	4
B. There Is No Split Of Authority On Retroactive Revival Of Time Barred Criminal Actions Warranting Certiorari	10
C. The State Supreme Court Properly Applied Ex Post Facto Principles, As Articulated In *Collins v. Youngblood*	14

TABLE OF CONTENTS, CONT'D

I. **THE CALIFORNIA SUPREME COURT PROPERLY APPLIED DECISIONS OF THIS COURT TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE DUE PROCESS PRINCIPLES** 16

A. The State Supreme Court Properly Applied Clear And Unambiguous Due Process Principles 16

B. There Is No Split Of Authority On Retroactive Revival Of Time Barred Criminal Actions Warranting Certiorari 24

CONCLUSION 28

TABLE OF AUTHORITIES

	Page
Cases	
Albright v. Oliver, 510 U.S. 266 (1994)	17, 20
Andrews v. State, 392 So.2d 270 (Fla. App. 1980)	11
Beazell v. Ohio, 269 U.S. 167 (1925)	6, 9, 13, 23
Calder v. Bull, 3 U.S. 386 (1798)	5-8
California Department of Corrections v. Morales, 514 U.S. 499 (1995)	5
Campbell v. Holt, 115 U.S. 620 (1885)	25, 26
Chase Securities Corp. v. Donaldson, 325 U.S. 304	24-26
Collins v. Harker Heights, 503 U.S. 115 (1992)	17
Collins v. Youngblood, 47 U.S. 37 (1990)	*Passim*
Commonwealth v. Bargeron, 402 Mass. 589 524 N.E.2d 829 (1988)	11

TABLE OF AUTHORITIES, CONT'D

Commonwealth v. Guimento,
341 Pa. Super. 95
491 A.2d 166 (1985) 11, 12

Commonwealth v. Rocheleau,
404 Mass. 129
533 N.E.2d 1333 (1989) 11

Daniels v. Williams,
474 U.S. 327 (1986) 17

Dowling v. United States,
493 U.S. 342 (1990) 17, 18, 22

Drugger v. Williams,
593 So.2d 180 (Fla. 1991) 14

Duncan v. Missouri,
152 U.S. 377 (1894) 6

Ex Parte Scales,
853 S.W.2d 586 (Tex. Crim. App. 1993) 14

Falter v. United States,
23 F.2d 420 (2d Cir. 1928) 11, 22, 23

General Motors Corp. v. Romein
(1992) 503 U.S. 181 25

Graham v. Connor,
490 U.S. 386 (1989) 17

Herrera v. Collins,
506 U.S. 390 (1993) 18

TABLE OF AUTHORITIES, CONT'D

Kring v. Missouri,
107 U.S. 221 (1883) 7, 8, 13, 14

Malloy v. South Carolina,
237 U.S. 180 (1915) 6

Medina v. California,
505 U.S. 437 (1992) 17, 18, 20, 22, 24

Moore v. State,
43 N.J.L. 203 (E & A 1881) 11, 19, 20

Murphree v. Raybestos-Manhattan, Inc.,
696 F.2d 459 (6th Cir. 1982) 25

Patterson v. New York,
432 U.S. 197 (1977) 18

Pension Benefit Guaranty Corp. v. R.A. Gray & Co.
(1984) 467 U.S. 717 25

People ex rel. Reibman v. Warden of County Jail,
242 App. Div. 282
275 N.Y.S. 59 (1934) 19

People v. Buckner,
281 Ill. 340
117 N.E. 1023 (1917) 19

People v. Frazer,
21 Cal. 4th 737
88 Cal. Rptr. 2d 312
982 P.2d 180 (1999) *Passim*

TABLE OF AUTHORITIES, CONT'D

People v. Liebling,
36 Ill. App.3d 1073
344 N.E.2d 520 (1976) 11

People v. Massarella,
80 Ill. App.3d 552
400 N.E.2d 436 (1979) 11

People v. Montera,
195 Colo. 118
575 P.2d 1294 (1978) 11

People v. Shedd,
702 P.2d 267 (Colo. 1985) 11

People v. Smith,
171 Cal.App.3d 997
217 Cal.Rptr. 634 (1985) 11

People v. Whitesell,
729 P.2d 985 (Colo. 1986) 11

Shadburne-Vinton v. Dalkon Shield Claimants Trust,
60 F.3d 1071 (4th Cir. 1995),
cert. denied, 516 U.S. 1184 (1996) 25, 26

Snyder v. Massachusetts,
291 U.S. 97 (1934) 17, 24

Spencer v. Texas,
385 U.S. 554 (1967) 17

TABLE OF AUTHORITIES, CONT'D

State v. Cookman,
324 Ore. 19
920 P.2d 1086 (1996) 12

State v. Sneed,
25 Tex. Supp. 66 (1860) 11, 19

Tapia v. Superior Court,
53 Cal.3d 282 (1991) 5

Thompson v. Utah,
170 U.S. 343 (1898) 5-8, 14

United States ex re. Schumer,
520 U.S. 939 (1997) 5

United States v. Bischel,
61 F.3d 1429 (9th Cir. 1995) 13

United States v. Brechtel,
997 F.2d 1108 (5th Cir. 1993) 13

United States v. Hall,
26 F.Cas. 84 (D. Pa. 1809) 9

United States v. Knipp,
963 F.2d 839 (6th Cir. 1992) 12, 13

United States v. Lovasco,
431 U.S. 783 (1977) 15, 18, 24

United States v. Richardson,
512 F.2d 105 (3d Cir. 1975) 11

TABLE OF AUTHORITIES, CONT'D

Usery v. Turner Elkhorn Mining Co.,
(1976) 428 U.S. 1 — 25

Wesley Theological Seminary v. United State Gypsum Co.,
876 F.2d 119 (D.C. Cir. 1989),
cert. denied, 494 U.S. 1003 (1990) — 26

William Danzer & Co. v. Gulf & S.I.R. Co.,
268 U.S. 633 (1925) — 25, 26

Constitutional Provisions

United States Constitution
amendment XIV, § 1 — 2
article I, § 10 — 8, 9, 17
article I, § 10, clause 1 — 2
Fifth Amendment — 26

Statutes

28 U.S.C.
§ 1257(a) — 1

California Penal Code
§ 288(a) — 2
§ 800 — 2
§ 803(g) — 2, 3, 16, 23, 24

TABLE OF AUTHORITIES, CONT'D

Court Rules

Supreme Court Rule
rule 13.3 1

Other Authorities

1 Wharton's Criminal Law,
§ 92, at 628 (15th ed. 1993) 18

21 Am.Jur.2d, Criminal Law,
§ 223, at 408 18, 19

Black, *Statutes of Limitation and the Ex Post Facto Clause*,
26 Kentucky L.J. 41 (1937) 18

The American Students' Blackstone,
at 1007 (Chase's Blackstone 1884) 18

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

No. 99-1193

RAYMOND L. FRAZER, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

OPINION BELOW

The California Supreme Court's opinion is reported at *People v. Frazer*, 21 Cal. 4th 737, 88 Cal. Rptr. 2d 312, 982 P.2d 180 (1999). The Court's order modifying the opinion is reported at 21 Cal. 4th 867A.

JURISDICTION

The opinion of the California Supreme Court as to which petitioner seeks review was filed on October 20, 1999. The petition for writ of certiorari was timely filed. (Sup.Ct.Rule 13.3.)

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONS AND STATUTES

United States Constitution, Article I, Section 10, Clause 1:

> "No state shall . . . pass any . . . ex post facto Law . . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

California Penal Code sections 800 and 803(g). *See People v. Frazer*, 21 Cal. 4th at 743 n.2, 745 n.4, 746 n.9, 747 n.10.

STATEMENT OF THE CASE

In October 1996, petitioner was charged with one count of lewd or lascivious conduct with a child under the age of 14 years in violation of California Penal Code section 288(a), alleged to have been committed in 1984. In 1984, the statute of limitations for the charged offense was six years. Accordingly, prosecution was commenced pursuant to California Penal Code section 803(g), which provides that a complaint alleging the commission of a specified sex offense against a child may be filed within one year of the time the victim reports the crime to a law enforcement agency, provided the act involved substantial sexual conduct and there is independent evidence that clearly and convincingly corroborates the victim's allegation. *People v. Frazer*, 21 Cal. 4th at 742, 750-51.

Petitioner demurred, arguing that retroactive application of section 803(g), which took effect in 1994, violated ex post facto principles and denied him due process of law. The trial court sustained the demurrer,

and the state court of appeal affirmed. *People v. Frazer*, 21 Cal. 4th at 742, 750-51.

The California Supreme Court reversed the judgment of the court of appeal. A majority of the court found retroactive application of Penal Code section 803(g) did not violate ex post facto principles or deny a defendant due process of law. The dissent found a violation of the *state* constitutional due process clause. *People v. Frazer*, 21 Cal. 4th 737. The court denied petitioner's petition for rehearing. (Pet. Exs. B, C.)

REASONS FOR DENYING THE WRIT

ARGUMENT

I.

THE CALIFORNIA SUPREME COURT PROPERLY INTERPRETED *COLLINS V. YOUNGBLOOD*, 497 U.S. 37 (1990) TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE EX POST FACTO PRINCIPLES

Petitioner argued below that retroactive application of an extended statute of limitations, so as to revive an expired cause of action in a criminal case, violates the federal Ex Post Facto Clause. The California Supreme Court disagreed, finding petitioner's claim meritless under the formula prescribed in *Collins v. Youngblood*, 497 U.S. 37 (1990) for determining when penal legislation triggers ex post facto protection. *People v. Frazer*, 21 Cal. 4th at 754-65.

Petitioner asserts certiorari is necessary to resolve "ambiguous and possibly contradictory language from this Court's opinions" as to the scope of the Ex Post Facto Clause and to resolve "conflicts among the state courts of last resort" as to the constitutionality of retroactive revival of time-barred criminal actions. (Pet. at 5, 13.) Respondent disagrees.

A. *Collins v. Youngblood* Is A Clear And Unambiguous Statement Of The Law

In *Youngblood*, the California Supreme Court noted, this Court "subjected its ex post facto jurisprudence to close scrutiny" *Frazer*, 21 Cal. 4th at 756, and it "greatly

simplified ex post facto law," *Tapia v. Superior Court*, 53 Cal. 3d 282, 293 (1991). *Youngblood*, the state court found, held the Ex Post Facto Clause prohibits only two types of retroactive laws: those that "alter the definition of crimes or increase the punishment for criminal acts." *Frazer*, 21 Cal. 4th at 22, *quoting Youngblood*, 497 U.S. at 43; *see also Youngblood*, 497 U.S. at 44, 49; *California Department of Corrections v. Morales*, 514 U.S. 499, 504 (1995). A retroactive change in the statute of limitations, the state court held, does neither of these things, and so it is not proscribed, even though it may inure to a criminal defendant's disadvantage. *Frazer*, 21 Cal. 4th at 757-65.

According to petitioner, the instant case raises the issue of whether this Court in *Youngblood* intended "a literalistic 'definition of the crime' approach" and whether it "correctly states the *ex post facto* prohibition." (Pet. at 6.) "[O]ther passages of opinions of this Court," he says, "point away from a literalistic 'definition of the crime' approach." (Pet. at 6.) As support for this statement, petitioner relies on a pre-*Youngblood* case, *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), which was examined in detail in *Collins*, and on a one-line parenthetical summary in another case, *Hughes Aircraft Corp. v. United States ex re. Schumer*, 520 U.S. 939, 948 (1997), *citing* "[*Youngblood*] ('A law that abolishes an affirmative defense' violates the Ex Post Facto Clause)." (Pet. at 6-7.) An examination of *Youngblood*, however, makes clear this Court's intention that the Ex Post Facto Clause prohibits only those retroactive laws that "alter the definition of crimes or increase the punishment for criminal acts." *Youngblood*, 497 U.S. at 43.

In *Youngblood*, the Court addressed a sex offender's claim that a new statute permitting an appellate court to reform an otherwise improper verdict, rather than requiring a new trial, could not be applied retroactively. The Court of Appeals had held he was entitled to relief, relying on *Thompson v. Utah*, 170 U.S. 343 (1898) in which

this Court had held that procedural statutes cannot be retroactively applied unless they "'leave untouched all the substantial protections with which existing law surrounds the person accused of crime.'" *Id.* at 352, *quoted in Youngblood*, 497 U.S. at 40.

This Court reversed. In so doing, the Court endorsed its earlier formulation of the law in *Calder v. Bull*, 3 U.S. 386, and *Beazell v. Ohio*, 269 U.S. 167 (1925), as "faithful to our best knowledge of the original understanding" of the Ex Post Facto Clause. *Youngblood*, 497 U.S. at 43. It declared,

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Id. at 42, *quoting Beazell*, 269 U.S. at 169-70.

In adhering rigidly to the *Beazell* and *Calder* definitions of the Ex Post Facto Clause as applying only to the three categories of proscribed laws, the Court rejected language in two of its previous cases that contained language indicating a more expansive interpretation. *Youngblood*, 497 U.S. at 46, *citing Duncan v. Missouri*, 152 U.S. 377, 382-83 (1894), and *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). The Court then examined two other cases to determine whether they could be reconciled with the definition the Court adopted. Each had defined the Ex Post Facto Clause in such a way as to indicate it

extended beyond the three *Calder* and *Beazell* categories.[1] In *Kring v. Missouri*, 107 U.S. 221 (1883), the Court had stated that the *Calder* list was non-exclusive, and it defined an ex post facto law to include, also, one that "in relation to the offence or its consequences, alters the situation of a party to his disadvantage." In *Thompson v. Utah*, 170 U.S. 343, the Court had stated that a law was ex post facto if, after commission of the crime, it deprived a defendant of a "substantial right involved in his liberty."

In *Kring*, the defendant had pleaded guilty to second-degree murder, pursuant to a plea agreement. After reversal of his conviction, because of an unlawful sentence, the state tried and convicted him of first-degree murder. At the time the crime was committed, Missouri law had provided that a plea of guilty to second-degree murder constituted an acquittal of first degree murder. This Court held the state's abrogation of the implied-acquittal rule after the crime was committed, but before Kring entered his plea, violated the Ex Post Facto Clause, because, in denying Kring the benefit of an implied acquittal to which he would previously have been entitled, the change in the law "altered the situation to his disadvantage." 107 U.S. at 235; *see Youngblood*, 497 U.S. at 47-49.

In *Youngblood*, the Court stated it could reconcile *Kring* with the definition of an ex post fact law it adopted if it were to say the change in state law had deprived Kring of a "defense" to which he previously had been entitled. 497 U.S. at 50. The Court explained,

---

1. Whether a fourth category of ex post facto laws identified in *Calder* has any legal significance independent of the three traditional categories is before this Court in *Carmell v. Texas*, 98-7450. In *Youngblood*, the Chief Justice pointed out that the Court has not endorsed this fourth category; instead, the Court has adopted a "definition [that] omits the reference by Justice Chase in *Calder v. Bull* to alterations in the 'legal rules of evidence.'" 497 U.S. at 43 n.3.

however, that by "defense" it means something linked to the "legal definition of the offense." *Id.* Thus, for example, "[a] law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done." *Id.* at 49. The Court continued,

> The "defense" available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge. . . . The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party of his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution.

Id. at 50. Accordingly, the Court expressly overruled *Kring*. *Id.*

In *Thompson v. Utah*, 170 U.S. 343, the defendant was initially convicted by a 12-person jury. A new trial was granted, but, in the meantime, Utah's law had changed, and Thompson was tried by an eight-person jury. The Court had reversed the conviction because retrial by a smaller panel had "materially alter[ed] the situation to Thompson's disadvantage." *Id.* at 352-53. The Court in *Youngblood* expressly overruled *Thompson* as well, stating that, while the right to a jury trial "is obviously a 'substantial' one, . . . it is not a right that has anything to do with the definition of crimes, defenses, or

punishments, which is the concern of the *Ex Post Facto* Clause." *Youngblood*, 497 U.S. at 50-52.

As an example of a case in which a defense could not be denied without violating ex post facto principles, the Court in *Youngblood* cited *United States v. Hall*, 26 F.Cas. 84 (D. Pa. 1809). There, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo. As a legal excuse, the defendant argued a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo. *Youngblood*, 497 U.S. at 49. The Court explained,

> [A]ccording to the law in effect at the time Hall forfeited the cargo, an "unavoidable accident" was an affirmative defense to a charge of failing to deliver cargo. . . . [A] subsequent law imposing an additional requirement for the affirmative defense—that the vessel or cargo actually *be lost at sea* as a result of the unavoidable accident—would deprive Hall of a defense of his actions available at the time he sold the cargo and thus be an invalid ex post facto law.
>
> This analysis is consistent with the *Beazell* framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done. . . .

Id. (emphasis in original).

The Court in *Youngblood* concluded, with regard to the case before it,

> The Texas statute allowing reformation of improper verdicts does not punish as a crime an

> act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the *Ex Post Facto* Clause of Art. I, § 10.

497 U.S. at p. 52.

Youngblood is a clear and unambiguous statement of the law as to the scope of the Ex Post Facto Clause. The California Supreme Court properly articulated that law: The Ex Post Facto Clause prohibits only those laws that "alter the definition of crimes or increase the punishment for criminal acts." *People v. Frazer*, 21 Cal. 4th at 22, *quoting Collins v. Youngblood*, 497 U.S. at 43. Hence, there is no ambiguity warranting certiorari.

B. There Is No Split Of Authority On Retroactive Revival Of Time Barred Criminal Actions Warranting Certiorari

Petitioner further asserts there is a "split of authority among national jurisdictions on retroactive revival of time-barred criminal actions," and so certiorari is warranted. (Pet. at 8.) He correctly notes that California appears to be the only jurisdiction that has "squarely held that Legislative revival of time-barred criminal actions" does not offend the federal Ex Post Facto Clause. (Pet. at 9.) He cites several cases that have held to the contrary. (Pet. at 8.) These cases, however, must be viewed in context.

With one exception, the cases cited were decided prior to *Collins v. Youngblood*, at a time when a more

expansive interpretation of the Ex Post Facto Clause was seen as permissible. *Commonwealth v. Rocheleau*, 404 Mass. 129, 533 N.E.2d 1333 (1989)[2]; *People v. Shedd*, 702 P.2d 267 (Colo. 1985)[3]; *Moore v. State*, 43 N.J.L. 203 (E & A 1881); *State v. Sneed*, 25 Tex. Supp. 66 (1860); *Commonwealth v. Guimento*, 341 Pa. Super. 95, 491 A.2d

---

2. In *Rocheleau*, the court held that, because the statute of limitations was extended by an amendment after the indictments were time barred under the then-effective statute of limitations, "The indictments [could not] stand." 533 N.E.2d at 1334. According to petitioner, "*Rocheleau* does not specifically state whether its holding was based on the state or federal Constitution." (Pet. at 8 n.1.) In fact, the court's opinion made no mention of any constitutional provision. Rather, it simply cited a number of cases, in each of which the statute of limitations was extended prior to the time the then-applicable limitations period had run, so that any comment regarding reviving an expired cause of action was dictum. *Id.* at 1334, *citing Commonwealth v. Bargeron*, 402 Mass. 589, 524 N.E.2d 829 (1988), *People v. Smith*, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985), *People v. Whitesell*, 729 P.2d 985 (Colo. 1986), *People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E.2d 436 (1979), *People v. Liebling*, 36 Ill. App. 3d 1073, 344 N.E.2d 520 (1976).

3. Petitioner incorrectly refers to the case as *State v. Shedd*.

In *Shedd*, the court stated that a case "barred from prosecution by a statute of limitations cannot be revived by subsequent legislation that acts to extend the limitations period." 702 P.2d at 268. It then listed five cases as examples. Four of those cases involved an extension of the statute of limitations prior to the expiration of the previously-applicable limitations period. *United States v. Richardson*, 512 F.2d 105 (3d Cir. 1975); *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928); *People v. Liebling*, 344 N.E.2d 520; *Andrews v. State*, 392 So.2d 270 (Fla. App. 1980). The fifth case involved a reduction of a statute of limitations, so the court stated that the rule that a statute of limitations could be extended prior to the expiration of the previously-applicable period was inapplicable. *People v. Montera*, 195 Colo. 118, 575 P.2d 1294, 1295 n.3. (1978). Hence, again, any reference in these cases to reviving expired causes of action was dictum.

166 (1985).[4] In the single post-*Collins* case, the state supreme court held the revival of an expired cause of action violated the state Ex Post Facto Clause, which it interpreted as giving different protection than its federal counterpart. *State v. Cookman*, 324 Ore. 19, 920 P.2d 1086 (1996).

There is, thus, no "split of authority among national jurisdictions" (Pet. at 8) on the question resolved by the California Supreme Court warranting review by this Court. Moreover, to the extent the federal courts have spoken, they support the holding of the state court.

Applying the *Youngblood* formula, the state court found "the only 'defense[s]' that cannot be restricted or withdrawn for ex post facto purposes are those bearing on the 'definition' or 'elements' of the charged crime, or involving 'an excuse or justification for the conduct underlying such a charge.'" *Frazer*, 21 Cal. 4th at 757, *quoting Collins v. Youngblood*, 497 U.S. at 50. A change in the statute of limitation, the court held, "does not impermissibly withdraw a 'defense' as that term of art is used for ex post facto purposes in [*Youngblood*]." *People v. Frazer*, 21 Cal. 4th at 760. Stated otherwise, "[s]tatutes regulating the time at which a future criminal prosecution may be filed do not implicate the manner in which criminal conduct is defined and punished at the time it occurs—the sole concern of the ex post facto clause." *Id.* at 763. Accordingly, a retroactive change in the statute of limitations does not violate ex post facto principles.

In *United States v. Knipp*, 963 F.2d 839 (6th Cir. 1992), the Court of Appeals rejected the defendants' claim that extending the statute of limitations prior to its expiration violated the ex post facto clause.

---

4. Petitioner incorrectly cites *Guimento* as having been decided in 1995. In any event, it was decided on state, not federal, grounds.

> Pleading an expired limitations period is certainly a defense in the general sense that it is a defensive measure. More particularly, however, it is a matter in bar of prosecution and as such is distinguishable from a "pure" defense, which defeats one or more of the elements of the crime. This distinction was noted and strongly reinforced by the Court in *Youngblood* when the Court, after an extended analysis, decided to overrule *Kring v. Missouri* [107 U.S. 221], because in *Kring* it had erred in confusing procedural defenses with defenses to the elements of the crime. . . .
>
> Thus, "defense" as used in *Beazell* [*v. Ohio*, 269 U.S. 167] means a defense related to the definition or elements of the crime. It does not have the much broader meaning assigned to it by defendants, because a plea in bar is not related to the definition of a crime and is not pleaded as a nullification of one or more of its elements or as an excuse or justification for its commission.[5/] Accordingly, defendants' reliance on [*Youngblood*] is entirely misplaced.

United States v. Knipp, 963 F.2d at 843-44. The court in *United States v. Brechtel*, 997 F.2d 1108 (5th Cir. 1993), reached the same conclusion. *See also United States v.*

---

5. Unlike justification or excuse, the statute of limitations does not put into issue the existence of any of the essential elements constituting the defendant's guilt of the charged offense. Rather, by pleading the statute of limitations, a defendant "simply asserts that by virtue of an extrinsic condition, not relating to the commission of the offense, but recognizing its commission, namely a statute of repose or limitation, he is not now subject to punishment for the crime which he admits having committed." *Osborn v. State*, 194 P.2d 176, 182 (Okla. 1948).

Bischel, 61 F.3d 1429 (9th Cir. 1995) (agreeing with *Knipp* and *Brechtel* that the statute of limitations is not the kind of "defense" to which the Supreme Court was referring in *Youngblood*). The analysis in each these federal cases thus is consistent with the state court's holding.

Petitioner further contends the "'definition of the crime' interpretation of *Youngblood* also creates another conflict among jurisdictions." (Pet. at 10.) This approach, he states, permits a legislature to retroactively eliminate other defenses without violating ex post facto principles, but "[o]ther jurisdictions have found an *ex post facto* violation on this type of issue." (Pet. at 10.)

With two exceptions, the cases he cites were decided prior to *Youngblood*. In one post-*Youngblood* case, the issue before the court was whether a retroactive change in the law violated the state ex post facto clause, and there was no discussion of the federal constitutional provision or *Youngblood*. *Drugger v. Williams*, 593 So.2d 180 (Fla. 1991). In the other, the court noted that prior cases employing the *Kring/Thompson* "substantial protection" analysis were no longer valid in light of *Collins*, it adopted the same test employed by the California Supreme Court here—"legislatures may not retroactively alter the definition of crimes or increase the punishments for criminal acts"—citing *Youngblood*, and it did not find an ex post facto violation. *Ex Parte Scales*, 853 S.W.2d 586 (Tex. Crim. App. 1993). Hence, again, there is no conflict among the jurisdictions warranting certiorari.

C. The State Supreme Court Properly Applied Ex Post Facto Principles, As Articulated In *Collins v. Youngblood*

It is the State's position that reviving an expired cause of action does not violate ex post facto principles. It should be noted, however, that this does not necessarily

mean reviving an expired cause of action is constitutional. It is possible there is another constitutional impediment to these prosecutions. As the state court recognized, in a particular case, the revival of an expired cause of action may offend due process if the defendant is able to make a factual showing sufficient to prove the amended statute affects the accuracy or fairness of a determination of his guilt or that it obviates or avoids procedures that are necessary for preventing miscarriages of justice. *People v. Frazer*, 21 Cal. 4th at 773-75, *discussing United States v. Lovasco*, 431 U.S. 783, 796 (1977).

But while the law must be fair, fairness cannot be had at the expense of a true interpretation of the Constitution. And, if we are true to the meaning of the Ex Post Facto Clause, as explained by this Court and properly applied by the California Supreme Court, petitioner's prosecution does not violate ex post facto principles.

II.

THE CALIFORNIA SUPREME COURT PROPERLY APPLIED DECISIONS OF THIS COURT TO FIND PETITIONER'S PROSECUTION DID NOT VIOLATE DUE PROCESS PRINCIPLES

Petitioner argued below that retroactive application of California Penal Code section 803(g), so as to revive an expired cause of action, is prohibited by the federal Due Process Clause. The California Supreme Court rejected his substantive due process challenge, and it found his procedural due process claim not ripe for adjudication. *People v. Frazer*, 21 Cal. 4th at 765-75. He argues certiorari is necessary to resolve whether reviving an expired cause of action comports with fundamental fairness and to reconcile two lines of Due Process Clause cases. (Pet. at 14-15.) Respondent disagrees.

A. The State Supreme Court Properly Applied Clear And Unambiguous Due Process Principles

Petitioner correctly notes this case "presents the issue" of whether legislative revival of a time-barred criminal action is fundamentally unfair. (Pet. at 14.) Whatever nationwide interest may be attributed to resolution of this issue, however, the California Supreme Court's decision does not conflict with decisions of this Court and requires no resolution by this Court.

The Due Process Clause is the source of three different kinds of constitutional protection. First, "it incorporates specific protections defined in the Bill of Rights . . . . Second, it contains a substantive component, sometimes referred to as 'substantive due process,' which

bars certain arbitrary government actions regardless of the procedures used to implement them. Third, it is a guarantee of fair procedure, sometimes referred to as 'procedural due process,' which applies whenever the state seeks to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 337 (1986).

This Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115 (1992); *Albright v. Oliver*, 510 U.S. 266, 272 (1994). When a particular constitutional amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. at 813, *quoting Graham v. Connor*, 490 U.S. 386, 395 (1989).

This principle is applicable in the instant case. The Framers of the Constitution considered the matter of retroactive changes in the law, and they drafted the Ex Post Facto Clause of Article I, section 10, of the United States Constitution, to address it. That clause, which declares that "[n]o bill of attainder or ex post facto law shall be passed," provides an "explicit textual source of constitutional protection" against retroactive legislative changes in criminal law, and it is not to be supplemented through the device of "substantive due process." *See People v. Frazer*, 21 Cal. 4th at 772 n.31.

Moreover, this Court consistently has exhibited a reluctance to use the Due Process Clause to interfere with a state's ability to control its criminal procedure. *See Medina v. California*, 505 U.S. 437, 445-46 (1992); *Spencer v. Texas*, 385 U.S. 554 (1967); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In *Dowling v. United States*, 493 U.S. 342 (1990), the Court declared that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due

Process Clause has limited operation." *Id.* at 352. Accordingly, the Court explained, it had defined very narrowly the category of infractions that violate the "fundamental fairness" component of the Due Process Clause. *Id.* Quoting *United States v. Lovasco*, 431 U.S. at 790, the Court stated that an action will be considered fundamentally unfair if it "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community sense of fair play and decency.'" *Dowling v. United States*, 493 U.S. at 353 (citations omitted).

In *Medina v. California*, 505 U.S. 437, the Court articulated the proper analytical framework for determining the validity of a state criminal procedure under the Due Process Clause. First, a court looks to "historical practice," which is "probative of whether a procedural rule can be characterized as fundamental." *Id.* at 446, *citing Patterson v. New York*, 432 U.S. 197, 202 (1977). In *Medina*, the Court's historical analysis demonstrated reliance on the common law and on caselaw through the turn of this century. *Id.*; *see also Herrera v. Collins*, 506 U.S. 390 (1993). Contemporary practice, the Court noted, is "of limited relevance to the due process inquiry." *Medina v. California*, 505 U.S. at 447.

At common law, there was no limitation of time for prosecuting a crime. 21 Am.Jur.2d, Criminal Law, § 223, at 408. Then, as now, in the absence of a statutory limitation, a prosecution could be brought at any time following the commission of an offense. *See* 1 Wharton's Criminal Law, § 92, at 628 (15th ed. 1993); Black, *Statutes of Limitation and the Ex Post Facto Clause*, 26 Kentucky L.J. 41 (1937). By Blackstone's time, however, statutes of limitations were common in criminal actions and could be pleaded in bar to a prosecution brought outside the period provided. *See* The American Students' Blackstone at 1007 (Chase's Blackstone 1884).

Sometime prior to 1881, "Mr. Bishop in his treatise on Statutory Crimes, section 266" suggested that "a criminal statute of limitations simply withholds from the courts jurisdiction over the offence after the specified period, and it is competent for the legislature to revive the old jurisdiction or create a new one, when the prosecution may proceed." *Moore v. State*, 43 N.J.L. 203, 213 (E & A 1881). To respondent's knowledge, it was not until 1860 that a court in this country first held a statute of limitations could not operate to revive offenses that were barred at the time of its enactment. *State v. Sneed*, 25 Tex. Supp. at 67; *see* 21 Am.Jur.2d, Criminal Law, § 224, at 411 and n.48, *citing Moore v. State*, 43 N.J.L. 203; *People v. Buckner*, 281 Ill. 340, 117 N.E. 1023 (1917), and *People ex rel. Reibman v. Warden of County Jail*, 242 App. Div. 282, 275 N.Y.S. 59 (1934).

Since that case in 1860, however, few cases have actually *held* that the revival of a prosecution after the expiration of a statute of limitations is prohibited by the constitution. Rather, by far the majority of cases have involved the extension of a statute of limitations, and any discussion about the revival of a prosecution was merely dicta.[6] Thus, it has only been relatively recently that

---

6. A number of these decisions explain the distinction between the extension of a statute of limitations and the revival of a right of prosecution after the expiration of a statute of limitations in terms of "vested right," that is, that the running of the statutory period "vests" in the criminal an indefeasible right not to be prosecuted—a sort of de facto grant of immunity. The best example of this view, and the apparent source for it, is the majority opinion in *Moore v. State*, 43 N.J.L. 203, which includes an extensive discussion of "vested rights" with reference to the Due Process Clause. The majority, reasoning by analogy to "civil causes," in which the running of a statute of limitations has the effect of vesting title to property, concluded that "every reason which has pressed courts to ascribe finality to the limitation of civil remedies, when once it has attached, impels this court to predicate the same conclusiveness of the bar against criminal

prosecutions." *Id.* at 212.

In dissent in *Moore*, Judge Van Sykel rebutted the majority's vested rights analysis and the analogy on which it rested. 43 N.J.L. at 229-56. Just as Judge Van Sykel's dissent from the majority's ex post facto holding anticipated the Supreme Court's opinion on the scope of that prohibition in *Collins v. Youngblood*, 497 U.S. 37, the principles he applied to test the majority's "vested rights" theory were consistent with those later set forth by the Supreme Court in *Albright v. Oliver*, 510 U.S. 266, and *Medina v. California*, 505 U.S. 437, to resolve due process claims. 43 N.J.L. at 240-55. For example, he explained,

> No one, I think, will assert that the preservation and continuation [of the right to assert the statute of limitations as a bar to prosecution] is comparable in importance to the state or to its citizens with the right of trial by jury, the privilege of the writ of *habeas corpus*, the exemption from cruel punishments and illegal searches, or the right of freedom from a second trial after acquittal. Yet, each and all of these vested rights, if not entrenched in the organic law, but arising only by statute, it cannot be doubted, might be swept away at the legislative will. They are beyond the reach of hostile legislation, not because they are vested rights, but for the reason that they are rights guaranteed by a law which is higher than the law-maker.
>
> Something more, then, must be done than to conclude that the defendant had by the lapse of the limitation a vested right to immunity, to justify the court in interposing between the law and the prisoner who has violated it; it must be shown that the vested right has a basis in the constitution itself, either by expression or by clear implication. Not only is there an entire absence of any such sanction for it, but the most diligent search which I have been able to give the subject has failed to find even a suggestion, by any text-writer, or in any judicial opinion, that the doctrine of vested rights has any existence in the law; except in its application to property.
>
> It may be that the right of the defendant, prior to the passage of the act of 1879, to set up the statute of limitations, is of such importance that it ought to have been unassailable, but the framers of our constitution

courts have held a state may not revive a right of prosecution after the expiration of a statute of limitations, and those courts have been few in number. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

Moreover, the courts that have held the revival of a prosecution was unconstitutional did so by finding a violation of the Ex Post Facto Clause, not the Due Process Clause. Likewise, those cases that gratuitously remarked upon the constitutionality of the revival of a right of prosecution after the expiration of a limitations period based their comments upon the Ex Post Facto Clause. *See People v. Frazer*, 21 Cal. 4th at 763-64 and n.5.

There is, thus, no settled, long-standing tradition with respect to the revival of a right of prosecution after the expiration of a statute of limitations. Hence, "historical practice" does not provide a basis for finding that the shelter provided by a statute of limitations is a fundamental right, so that a legislature is prohibited, as a matter of due process of law, from amending it to restore a state's right to prosecute a criminal defendant.

> having failed to put this restriction upon the legislature, the courts cannot do it, without in effect assuming to amend the constitution, to make it conform with judicial ideas of what ought to be.
>
> . . . . . .
>
> Adapting [Justice Chase's argument in *Calder* v. *Bull* [3 U.S. (3 Dall.) 386, that the ex post facto prohibition does not apply to contracts] to the present contention, it may with equal force be asked, why was the ex post facto clause engrafted upon the constitution, if the rights which the criminal may at any time have under existing laws, were deemed to be vested rights entitled to the same protection accorded to vested rights of property?
>
> It is obvious that it was never supposed that such a principle could be invoked to support immunity for crime.

43 N.J.L. at 250-51.

If, however, there is no historical basis for concluding the state procedure violates due process, *Medina v. California*, 505 U.S. 437, requires a court to make a second inquiry. Here, the court inquires "whether the rule transgresses any recognized principle of fundamental fairness in operation." *Id.* at 448, *citing Dowling v. United States*, 493 U.S. at 352.

The most well-known expression of the statement that reviving an expired cause of action is fundamentally unfair is Judge Learned Hand's statement in *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928). It is important, however, to read that statement carefully.

In *Falter*, the defendants argued the extension of a statute of limitations, prior to the expiration of the statute, constituted an ex post facto law. 23 F.2d at 425. Judge Hand rejected their claim, explaining,

> Perhaps they would be right, if the earlier statute had once run in their favor. But the period had not run, and the argument is, and must be, that any change after the commission of the crime, and while the time is running, is within the constitutional prohibition. . . .
>
> In Mallett v. North Carolina, 181 U.S. 589 [] (1901), it was held that the allowance of an appeal to the prosecution was constitutional, and Beazell v. Ohio, 269 U.S. 167 [], laid it down generally that the question was one of degree and depended upon whether the result was "harsh and oppressive." Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us

> unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the sta[t]e forgives it.

Falter v. United States, 23 F.2d at 425-26.

First, it is important to recognize the victims in *Falter* were not sexually abused children who, by their very nature, differ from the victims of other crimes. Moreover, it is significant that Judge Hand's comment was made in the context of an ex post facto analysis. It was the Ex Post Facto Clause, and not the Due Process Clause, that was alleged by the *Falter* defendants to have been violated by the amendment to the statute of limitations, 23 F.2d at 425, and it was to that allegation that Judge Hand responded. Indeed, both cases he cited, *Mallett* and *Beazell*, involved claims based on the Ex Post Facto Clause; neither made mention of the Due Process Clause. Additionally, the phrase "harsh and oppressive," which Judge Hand quoted from *Beazell*, did not support his subsequent statement that reviving a prosecution was "unfair and dishonest." In *Beazell*, the Supreme Court had stated that "laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive . . . ." 269 U.S. at 170. It is for that reason that laws in violation of the Ex Post Facto Clause are proscribed by the Constitution. As discussed previously, however, a law reviving an expired prosecution does not fall within that category.

Judge Hand's statement about the unfairness of reviving a prosecution has been accepted by subsequent courts with little or no analysis or question. But it is not a sufficient basis upon which to find the application of Penal Code section 803(g), to revive a prosecution "transgresses any recognized principle of fundamental

fairness in operation." *Medina v. California*, 505 U.S. at 448.

Fairness, as guaranteed by due process, "is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." *Snyder v. Massachusetts*, 291 U.S. at 116. Given the unique nature of child molestation cases, retroactive application of California Penal Code section 803(g) does not, *as a matter of law*, violate fundamental fairness. As the state court recognized, in a particular case, retroactive application of the statute may offend due process if the defendant is able to make a factual showing sufficient to prove retroactive application affects the accuracy or fairness of a determination of his guilt or that it obviates or avoids procedures that are necessary for preventing miscarriages of justice. *People v. Frazer*, 21 Cal. 4th at 773-75, *discussing United States v. Lovasco*, 431 U.S. at 796. That question, however, is not presented in this case. *People v. Frazer*, 21 Cal. 4th at 775.

B. There Is No Split Of Authority On Retroactive Revival Of Time Barred Criminal Actions Warranting Certiorari

Petitioner states that, if considerations of fundamental fairness are not dispositive, certiorari is warranted to reconcile two lines of Due Process Clause cases, which "have not been reconciled by this Court[,] and have drawn differing views from lower courts." (Pet. at 15.) Respondent disagrees.

In a civil context, in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), this Court stated,

> Statutes of limitation find their justification in necessity and convenience rather than in logic. . . . They represent expedients, rather than

> principles. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. . . . Their shelter has never been regarded as what now is called a "fundamental" right . . . . [T]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. at 314; *see Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459, 462-63 (6th Cir. 1982). In the instant case, the state supreme court found *Chase* to be controlling, finding "no meaningful basis on which to distinguish the six-year period in [California Penal Code] section 800 from the statute of limitations discussed in *Chase*." *People v. Frazer*, 21 Cal. 4th at 769.

Petitioner maintains that, from a federal constitutional perspective, there are two types of statutes of limitations: one type bars a remedy, and is subject to analysis under *Chase* and *Campbell v. Holt*, 115 U.S. 620 (1885); the other type extinguishes the right, and is governed by *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925). He asserts the statute of limitations in a criminal case in California is of the latter type, and, under *Danzer*, reviving an expired cause of action is unconstitutional. (Pet. at 15-17, 26-30.)

While *Danzer* and its progeny "analyzed the constitutionality of retroactive time bar statutes by drawing the substance versus procedure distinction, a more recent line of Supreme Court cases commands [the courts] to employ a different analysis." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1075 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996), *discussing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), and *General Motors Corp. v. Romein*, 503 U.S. 181

(1992). The recent cases "together stand for the proposition that the Due Process Clause of the Fifth Amendment allows retroactive application of either federal or state statutes as long as the statute serves a legitimate legislative purpose that is furthered by rational means." *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d at 1076. Accordingly,

> . . . [T]he analysis used by the Court in *Danzer*, *Chase*, and *Campbell* is outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation. The relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means.

Id.; *Wesley Theological Seminary v. United States Gypsum Co.*, 876 F.2d 119, 122 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) ("any substance/procedure dichotomy suggested by *Chase* is either completely defunct, or, at the very most, established procedural rules as a safe harbor within which a legislature may freely make retroactive changes").

In rejecting petitioner's substantive due process claim, the California Supreme Court explained,

> Of course, substantive due process principles preclude arbitrary and capricious legislation even where no fundamental right or liberty interest is at stake. Contrary to what defendant claims, section 803(g) is not unconstitutional under this deferential standard insofar as the statute "revives" previously time-barred prosecutions. Indeed, as the legislative history suggests, the statute is based on the assumption that past and future sex crimes against children, even though subject to

> corroboration by independent evidence, would otherwise go unpunished given the difficulty young victims experience remembering and reporting such events, and their emotional vulnerability at the hands of adult perpetrators, including those in positions of trust. The means chosen by the Legislature — allowing prosecution within one year of the official report, inserting express retroactivity and revival provisions, and requiring independent corroboration — seem particularly well suited to addressing the serious concerns underlying section 803(g).

People v. Frazer, 21 Cal. 4th at 773.

The analysis employed by the California Supreme Court was consistent with the standards articulated by this Court and the federal courts of appeal. There is no split of authority that warrants certiorari to review the state court's decision.

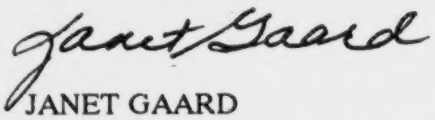
CONCLUSION

For the foregoing reasons, respondent respectfully urges this Court to deny the petition for writ of certiorari.

Dated: March 28, 2000.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
W. SCOTT THORPE
Supervising Deputy Attorney General



JANET GAARD
Special Assistant Attorney General
Counsel of Record

Counsel for Respondent

JG/mc
SA1997PA0020

Supreme Court, U.S.
FILED
APR 10 2000
CLERK

(3)

No. 99-1193

In the Supreme Court

OF THE

United States

RAYMOND FRAZER,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of California

REPLY BRIEF

MICHAEL B. DASHJIAN (Counsel of Record)
SYLVIA M. DASHJIAN
Law Offices of Michael B. Dashjian
1110 California Blvd. Suite D
(Mailing Address:) P.O. Box 512
San Luis Obispo, CA 93406-0512
Telephone: (805) 460-0300
Facsimile: (805) 460-0349
Email: firm@dashlaw.com
Counsel for the Petitioner

15pp

TABLE OF CONTENTS

Overview 1

I. *Ex Post Facto* Clause 2

II. Due Process Clause 8

A. Fundamental Fairness 8

B. Substantive Statutes Of Limitation 10

TABLE OF AUTHORITIES

CASES

Beazell v. Ohio, 267 U.S. 169 (1925) 2-4, 6

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 2

California Department of Corrections v. Morales, 514 U.S. 499 (1995) 2, 6, 9

Collins v. Youngblood, 497 U.S. 37 (1990) 2-7

Cowan v. Superior Court, 14 Cal.4th 367, 58 Cal.Rptr.2d 458, 926 P.2d 438 (1997) 5, 7

Doyle v. Ohio, 426 U.S. 284 (1976) 9

Dugger v. Williams, 593 So.2d 180 (Fla. 1991) (per curiam) . . 4

Duro v. Reina, 495 U.S. 676 (1990) 5

Ex Parte Scales, 853 S.W.2d 586 (Tex. Ct. Crim. App. 1993) 4

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 9

Garner v. Jones, 2000 U.S. LEXIS 2346 (U.S. Mar. 28, 2000) 1

Helton v. Fauver, 930 F.2d 1040 (3d Cir. 1991) 6

Hughes Aircraft Corp. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 2-4

International Shoe Co. v. State of Washington, 326 U.S. 310 (1945) 10

Jacox v. State, 154 Neb. 416, 48 N.W.2d 390 (1951) 7

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 1, 3

Lindsey v. Washington, 301 U.S. 397 (1937) 6

Loper v. Beto, 405 U.S. 473 (1972) 10

Lynce v. Mathis, 519 U.S. 433 (1997) 3, 5-7

Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998) 5

Miller v. Florida, 482 U.S. 423 (1987) 4, 6

Miranda v. Arizona 384 U.S. 436 (1966) 9

Ostrosky v. State, 704 P.2d 786 (Alas. Ct. App. 1985) 3

People v. Frazer, 21 Cal.4th at 737 (1999) 2

People v. Lovercamp, 43 Cal.App.3d 823, 118 Cal.Rptr. 110 (1974) 3

Raley v. Ohio, 360 U.S. 423 (1959) 9

Ross v. State, 411 So.2d 247 (Fla. 1982) 7

Schmuck v. United States, 489 U.S. 705 (1989) 1

Sparf v. United States, 156 U.S. 51 (1895) 1

State v. Losolla, 84 N.M. 151, 500 P.2d 436 (1972) 7

State v. McLaughlin, 80 N.Y.2d 466, 606 N.E.2d 1357,
591 N.Y.S.2d 966 (1992) 8

State v. Wagner, 596 N.W.2d 83 (Iowa 1999) 7

State v. Wardenburg, 261 Iowa 1395,
158 N.W.2d 147 (1968) 8

United States v. Baker, 10 F.3d 1374 (9th Cir. 1993),
cert. denied, 513 U.S. 934 (1994) 6

United States v. Juvenile Male, 819 F.2d 468 (4th Cir. 1987) . . 6

United States v. Lovasco, 431 U.S. 783 (1977) 1

United States v. Marion, 404 U.S. 307 (1971) 1

United States v. Oregon Lumber Co., 260 U.S. 29 (1922) 7

United States v. Timmereck, 441 U.S. 780 (1979) 1

Wainwright v. Greenfield, 474 U.S. 284 (1986) 9

Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990) 5

Weaver v. Graham, 450 U.S. 24 (1981) 8

STATUTES

11 Delaware Code § 232 7

18 Pennsylvania Consolidated Statutes § 103 7

31 U.S.C. § 3729 3

California Penal Code § 288 6

California Penal Code § 803 ..... 4, 6, 9

CONSTITUTIONS

United States Constitution, Amendment V 8

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1991) 7

James Madison, The Federalist No. 37 10

James Madison, The Federalist No. 44 1

Model Penal Code § 1.12 7

Model Penal Code § 1.13 7

Paine, Thomas, "Dissertation on First Principles of Government," in Common Sense and Other Political Writings 174 (Adkins, 1953) 1

Overview

Criminal statutes of limitation, in jurisdictions which have them (nearly all), are intended to "provide predictable, legislatively enacted limits on prosecutorial delay." *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *see United States v. Marion*, 404 U.S. 307, 322-23 (1971) [cited in Petn. at 26]. More generally, a high value is placed on legal certainty, stability, and finality in our system of justice. *See, e.g., United States v. Timmereck*, 441 U.S. 780, 784 (1979); *Sparf v. United States*, 156 U.S. 51, 83 (1895); *Schmuck v. United States*, 489 U.S. 705, 721 (1989).

Here, the State invokes the U.S. Constitution to seek a result that undoes order and stability in legal relations and destroys finality, by allowing a government to fake out its citizens with a promise of liberty on which the government can later renege at its pleasure, years or decades after the promise becomes unconditional. Petitioner disagrees that the Framers of our Constitution would have thought this an acceptable model of legislative power. *See also infra*, p. 10.

The State has not disagreed with petitioner's point that if a government can retroactively breach an unconditional promise of finality for people charged with sex offenses, it can do so for people charged with any type of offense. *See* Petn. at 12. That ill serves the key purpose of the prohibitions against retroactive legislation, curbing legislative "tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 & n. 20 (1994) [quoting Madison, Federalist No. 44]; *accord, e.g., Garner v. Jones*, 2000 U.S. LEXIS 2346, at 18 (U.S. Mar. 28, 2000). People charged with sex offenses may be today's unpopular group subjected to retroactive abrogation of finality in one or more states. Tomorrow's may be people alleged to have overestimated profits of a publicly traded corporation, underpaid taxes, negligently commanded a wrecked vessel, protested too vigorously for a cause of great importance to them, or the like. A constitutional protection denied one is denied all. *See, e.g.,* Thomas Paine, "Dissertation on First Principles of Government," in Common Sense and Other Political Writings 174 (Adkins, 1953).

I. *Ex Post Facto* Clause

The State severely truncates petitioner's authority for his showing that this Court has utilized differing and possibly conflicting formulations in describing the *ex post facto* prohibition. *See* Petn. at 5-8, 17-18. The State claims petitioner's authority was no more than "a pre-*Youngblood* case, *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), which was examined in detail in [*Collins v. Youngblood*, 497 U.S. 37 (1990)], and [a] one-line parenthetical summary in another case, *Hughes Aircraft Corp. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) . . . ." Br. Opp. at 5. Apparently, the State is trying to suggest that this Court has never used differing formulations of the *ex post facto* prohibition except in *Calder*, and it took care of *Calder* in *Youngblood*.

The State's effort is patently in error. In the same paragraph in which he cited *Calder* and *Hughes Aircraft*, petitioner also cited two passages in *Youngblood*, and two passages in *Beazell v. Ohio*, 267 U.S. 169 (1925), which supported his argument and worked against the State's narrow, technical view. Petn. at 6. Later, petitioner twice quoted Justice Thomas's opinion for this Court in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), and again quoted *Beazell*, for more formulations supporting his view that *ex post facto* analysis is not limited to immutable categories, and against the State's view that it is. Petn. at 7, 17-18.

Furthermore, while the State tries to dismiss *Hughes Aircraft* by a throwaway reference to a "one-line parenthetical," Br. Opp. at 5, the "one-line parenthetical" is this Court's description of its own *Beazell* and *Youngblood* opinions–after *Youngblood*. This Court in *Hughes Aircraft* quoted *Youngblood* for the point that "'A law that abolishes an affirmative defense' violates the *Ex Post Facto* Clause," and quoted *Beazell* for its point that "any statute . . . which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." 520 U.S. at 948 [quoting *Youngblood*, 497 U.S. at 49, and *Beazell*, 269 U.S. at 169-70]. Especially given the purpose of those citations in *Hughes Aircraft*, *see infra* p. 6, these are far more inclusive formulations of an *ex post facto* law than the "rigid," Br. Opp. at 6, and "technical," *People v. Frazer*, 21 Cal.4th at 763 n.24, theory of the State and the California Supreme Court.

The State tries to minimize the conflicts among jurisdictions, *see* Petn. at 8-10, by asserting that most of the *ex post facto* cases petitioner cited–in the statute of limitations area, and related areas such as pardon and immunity–were decided before *Youngblood*. Br. Opp. at 10-14. However, in *Youngblood* and after, this Court has held that "[t]he *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause." *Youngblood*, 497 U.S. at 43; *accord Lynce v. Mathis*, 519 U.S. 433, 440 (1997). Thus as the State acknowledges, Chief Justice Rehnquist's opinion in *Youngblood* reaffirmed *Beazell*. Br. Opp. at 6. The State therefore errs in claiming *Youngblood* so radically changed *ex post facto* analysis that no case before *Youngblood* is worthy of consideration. *See* Br. Opp. at 10-12.

Beazell described an *ex post facto* law as: "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission; or which deprives one charged with crime of any defense available according to law at the time when the act was committed." 269 U.S. at 169. (*Youngblood* had a similar formulation. 497 U.S. at 52.) A complete defense of limitations, pardon, immunity, etc. is a "defense available according to law" just like a defense such as entrapment, insanity, mistake of law (*Ostrosky v. State*, 704 P.2d 786, 791-92 (Alas. Ct. App. 1985)), or prison escape by necessity (*People v. Lovercamp*, 43 Cal.App.3d 823, 118 Cal.Rptr. 110 (1974)).

This Court has agreed, post-*Youngblood*. In *Hughes Aircraft Corp. v. Schumer*, 520 U.S. 939 [cited in Br. Opp. at 5], Justice Thomas's opinion for the Court relied on both *Youngblood* and *Beazell*, including the "any defense available according to law" passage from *Beazell* quoted above, in applying the presumption against civil statutory retroactivity to a defense that the allegedly withheld information was in possession of the Government. 520 U.S. at 848. The presumption against civil statutory retroactivity is utilized similarly to the *ex post facto* prohibition. *See Landgraf v. USI Film Products*, 511 U.S. at 266-67 & n. 20.

In *Hughes Aircraft*, the issue of who had the information was not within the State's rigid, technical theory of "definition of the [tort]"(*see* 31 U.S.C. § 3729). Like the limitations defense here, the

ostensibly abrogated defense in *Hughes Aircraft* was jurisdictional, affecting only the issue of standing to sue. Yet this Court cited *Youngblood* and *Beazell*, including *Beazell*'s "any defense available according to law" passage, to reject Schumer's claims.

The limitations defense here is no less a "defense available according to law," than the defense of Government possession of information was a "defense available according to law" in *Hughes Aircraft*. Perhaps neither fits exactly into the State's rigid, technical paradigm. But that paradigm is not and should not be the law.

The State's rigid, technical theory of an *ex post facto* law is also contrary to this Court's formulation in *Miller v. Florida*, 482 U.S. 423 (1987). There, Justice O'Connor's opinion for the Court stated that a retroactive amendment is not an *ex post facto* law if it "does not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." 482 U.S. at 432-33. California Penal Code § 803(g) clearly "changes the ultimate facts necessary to establish guilt" by eliminating a requirement for a guilty verdict, proof of compliance with the statute of limitations. As discussed *infra*, p. 6, it also increases the punishment for the charged crime, even under the State's narrow view.

The State also errs in claiming no post-*Youngblood* cases have found a federal *ex post facto* violation for retroactive abolition of a complete defense of statute of limitations, pardon, immunity, or the like. Br. Opp. at 12, 14.

First, the State misstates the holding of *Ex Parte Scales*, 853 S.W.2d 586 (Tex. Ct. Crim. App. 1993) [cited in Petn. at 10]. *Scales*, relying on *Youngblood*, found the abolition of the "carving doctrine" to be a judicial equivalent of an *ex post facto* law, using *ex post facto* standards, even though the Texas "carving doctrine" didn't fit within the technical "definition of the crime" paradigm the State uses here. *Scales*, 853 S.W.2d at 587-88. The State thus errs in claiming *Scales* found no *ex post facto* violation. Br. Opp. at 14.[1]

---

[1] The State also misconstrues another case to which petitioner referred. Contrary to the State's claim, Br. Opp. at 14, *Dugger v. Williams*, 593 So.2d 180 (Fla. 1991) (per curiam) [cited in Petn. at 10] dealt with the federal as well as the

(continued...)

Second, other post-*Youngblood* opinions have also held that retroactive abolition of a complete defense violates the *Ex Post Facto* Clause, though their defenses were jurisdictional and thus not within the State's rigid, technical "definition of the crime" theory.

In *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941, 947-48 (9th Cir. 1998), Judge Reed's opinion for the Court–relying on *Collins v. Youngblood*–held that the amendment which purported to create jurisdiction in the Tribal Court (and which sought to override *Duro v. Reina*, 495 U.S. 676 (1990)) would be *ex post facto* if applied retroactively. *Means* so held for three reasons: (1) Tribal Court jurisdiction would increase Means' exposure to punishment beyond that existing at the time of the charged offense; (2) retroactive application of the amendment would punish something which was not a crime at the time of the alleged offense, since "what constitutes 'a crime' is essentially what the sovereign defines as 'a crime,' [and] if the sovereign has no power over an individual then it essentially lacks the ability to define any of the individual's conduct as a crime"; and (3) retroactive application would deprive Means of a "defense available at the time of the alleged crime" (citing *Youngblood*, 497 U.S. at 52), namely, lack of jurisdiction.

Each of these three reasons in *Means* also applies to petitioner here: (1) Petitioner's exposure to punishment was increased beyond that existing at the time of the charged offense, for the reasons stated *infra*, p. 6 [discussing *Lynce v. Mathis* and similar cases]. (2) The sovereign (California) had no power of prosecution over petitioner beginning in 1990, and thus lacked the ability to define any of his conduct as a crime. (3) A fully ripe statute of limitations defense was a complete defense at the time of petitioner's alleged crime (1984). In fact, just as the issue in *Means* was a jurisdictional defense, the issue here–a California criminal statute of limitations–is also jurisdictional. *See Cowan v. Superior Court*, 14 Cal.4th 367, 374, 58 Cal.Rptr.2d 458, 926 P.2d 438 (1997).

---

[1](...continued)
state Constitution, as it relied on another case which expressly referred to the federal *Ex Post Facto* Clause and opinions of this Court construing it. *Id.* at 181 [citing *Waldrup v. Dugger*, 562 So.2d 687, 691-92 (Fla. 1990)].

Similarly in *Helton v. Fauver*, 930 F.2d 1040, 1045 (3d Cir. 1991), the Third Circuit held that retroactive application of a statute permitting jurisdiction in Superior Court rather than juvenile court met the *Beazell/Youngblood ex post facto* standard, as it increased the punishment to which Helton was potentially subjected, and it also deprived Helton of a complete defense that the Superior Court lacked jurisdiction. (The dissent agreed with the majority on this point. *Helton*, 930 F.2d at 1049 (Hutchinson, J., dissenting).)

The Fourth Circuit reached a similar conclusion in *United States v. Juvenile Male*, 819 F.2d 468 (4th Cir. 1987). While *Juvenile Male* relied on *Beazell*, it preceded *Youngblood*. However, Judge Boochever's opinion in *United States v. Baker*, 10 F.3d 1374, 1394-95 (9th Cir. 1993), *cert. denied*, 513 U.S. 934 (1994), citing *Youngblood* and *Beazell*, reached the same conclusion based on the Fourth Circuit's analysis in *Juvenile Male*.

As the State points out, other courts have construed *Youngblood* differently, and have concluded that *Youngblood* abrogated *Beazell*'s inclusion of "any defense available according to law" in the *ex post facto* prohibition. Br. Opp. at 12-14; *accord* Petn. at 9. That is all the more reason why certiorari is warranted.

In any event, this case is well within the State's "rigid," "technical" paradigm, as shown by Justice Stevens' opinion for this Court in *Lynce v. Mathis*, 519 U.S. 433 (1997). California Penal Code section 803(g) does "increase[] the penalty by which a crime is punishable," *Lynce*, 519 U.S. at 443 [quoting *Morales*, 514 U.S. at 506 n.3]: It raises that penalty from zero, to 3-8 years. *See* Petn. at 24; Cal. Pen. Code § 288. It thus creates a "sufficient risk of increasing the measure of punishment attached to the covered crimes," *Morales*, 514 U.S. at 509; if petitioner were convicted (the only relevant scenario), the risk would be 100%. Just as cancellation of gain time in *Lynce* made prisoners ineligible for early release when they were previously eligible, so too even more here, cancellation of a statute of limitations made persons ineligible for immunity from punishment when they were previously immune. *See* Petn. at 24. Such a retroactive law, increasing potential punishment, is *ex post facto*. *Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937); *Miller v. Florida*, 482 U.S. at 432-33; *see Morales*, 514 U.S. at 506 n.3.

Lynce postdated *Youngblood*, and is wholly consistent with it. Thus again, *Youngblood* cannot mean what the State, or the cases on which it relies, would have it mean.[2]

Youngblood makes clear that a mere change in "procedure by which a criminal case is adjudicated"–a change solely affecting method of adjudication, *see, e.g.*, Black's Law Dictionary 1203-04 (6th ed. 1991)–is usually not *ex post facto*. *Youngblood*, 497 U.S. at 45. But an expired statute of limitations (or immunity, pardon, etc.) is a full defense; and in California and other jurisdictions, the State must prove compliance with the statute for a conviction. *See ante*, p. 5. That is far from a mere procedure (method) of adjudication, especially in a state such as California, which considers a criminal limitations period substantive rather than procedural. *E.g.*, *Cowan v. Superior Court*, 14 Cal.4th at 371-72; *see Frazer*, 21 Cal.4th at 783 (Brown, J., dissenting). Indeed, a judgment can be based solely on a statute of limitations, and such a judgment is as binding as one based on failure of proof of an element. *United States v. Oregon Lumber Co.*, 260 U.S. 290, 300-01 (1922). By contrast, no judgment can be based solely on a mode of procedure.

In addition, the State's technical theory assumes a statute of limitations is not an element of a crime. *See, e.g.*, Br. Opp. at 5, 10, 12-14 & n.5; *People v. Frazer*, 21 Cal.4th at 757, 760, 764. But in some states, it is. *See, e.g.*, 11 Del. Code § 232; *Jacox v. State*, 154 Neb. 416, 419, 48 N.W.2d 390 (1951); 18 Pa. Cons. Stat. § 103(4); *see also* Mod. Pen. Code § 1.12(d). Similarly, many states consider other matters outside the State's "definition of crime" theory to be elements of crimes. *See, e.g.*, *State v. Losolla*, 84 N.M. 151, 152, 500 P.2d 436 (1972) [jurisdiction]; *Ross v. State*, 411 So.2d 247, 249 (Fla. 1982) [same]; *State v. Wagner*, 596 N.W.2d 83, 85 (Iowa 1999) [territorial jurisdiction]; *see also* Mod. Pen. Code § 1.13. The State's theory would be hopelessly muddled in these states.

---

[2] Beyond that, it does not seem logical to postulate that changes in discretionary gain-time awards are within *ex post facto* analysis, *see Lynce v. Mathis*, 519 U.S. at 448-49, as are some parole eligibility modifications, *see id.* at 445, but abolition of a nondiscretionary, complete right to an acquittal is not.

Other jurisdictions might not necessarily use the formal term "element" (often, perhaps, because they never thought about it), but still require proof of jurisdictional and similar matters beyond a reasonable doubt as if they were elements. *See, e.g., State v. McLaughlin*, 80 N.Y.2d 466, 472 & n.*, 606 N.E.2d 1357, 591 N.Y.S.2d 966 (1992); *State v. Wardenburg*, 261 Iowa 1395, 158 N.W.2d 147, 151 (1968). It is unclear how the State's technical paradigm would apply in these jurisdictions, and why (if it all) it would be different from jurisdictions which use an "elements" label. However, if the State tried to defend its position in such a jurisdiction based on the label "element" (perhaps the only principled position the State could take), that effort would fail because "it is the effect, not the form, of [a] law that determines whether it is *ex post facto*." *Weaver v. Graham*, 450 U.S. 24, 31 & n.15 (1981).

Finally, the State has not disputed petitioner's showing that the *Ex Post Facto* Clause, the closely related Bill of Attainder Clause, and the closely related presumption against statutory retroactivity, are construed in this Court's opinions based on function or effect rather than rigid, technical forms. Petn. at 19-20. The State also has not tried to defend the California Supreme Court's truncation of the purposes of the *Ex Post Facto* Clause; which further shows the State's legal theory is not and should not be the law, since the State's theory cannot survive consideration of the purpose which the California Supreme Court omitted. *See* Petn. at 20-22. In addition, the State has not addressed petitioner's discussion of the major changes or uncertainties which would result in Fifth Amendment law, if an expired limitations period didn't provide certain immunity from prosecution. Petn. at 11. And the State doesn't contest the point that for purposes here, a complete limitations defense is akin to defenses such as pardon or immunity. Petn. at 10 & n.3, 21.

II. Due Process Clause

A. Fundamental Fairness

The State claims there is nothing fundamentally unfair about a government promising a conditional immunity from prosecution (here, the promise that all prosecutions shall be brought within 6 years after the alleged offense), then reneging on the promise years–or decades–after the condition was perfected and the

immunity became unconditional. Three of the seven Justices of the California Supreme Court thought otherwise, concluding that a government reneging on such a (fully ripe) promise not to prosecute was a violation of the California Constitution because it was so fundamentally unfair. *People v. Frazer*, 21 Cal.4th at 780 (Kennard, J., dissenting); *id.* at 782-84 (Brown, J., dissenting).

The United States Constitution, no less than the California Constitution as construed by the three dissenting Justices, prohibits as fundamentally unfair such a governmental breach of promise to an individual, materially affecting the individual's liberty or property. Petitioner already adverted to this in Petn. at 30. *See also, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135-39 (1810).

In addition, this Court has so held for breaches of promises by prosecuting authorities which materially disadvantage the recipient of the promise with respect to criminal prosecution. For example, when a government implicitly promises a suspect it won't use silence against him by giving *Miranda* warnings, it is fundamentally unfair and a denial of Due Process for the government to breach that promise, and the post-*Miranda* silence is inadmissible for all purposes. *Doyle v. Ohio*, 426 U.S. 284, 290-95 (1976); *Wainwright v. Greenfield*, 474 U.S. 284, 290-95 (1986). Similarly, if a government promises a person immunity for any statements, it is fundamentally unfair and a denial of Due Process for the State to breach that promise, and the statements cannot be used in a later prosecution. *Raley v. Ohio*, 360 U.S. 423, 437-40 (1959).

Such cases further show that when government makes a (material) promise which becomes unconditional and affects a liberty or property interest, it may not later renege. So too here.

The State appears to claim, twice, that the California Supreme Court's holding is justified because California Penal Code § 803(g) involves charged victims of sex offenses. Br. Opp. at 23, 24. There is no support for a theory that the Due Process Clause bars retroactive revocation of immunity for some prosecutions, but permits it for others. What provision of the Constitution would enable one to determine which prosecutions permit retroactive revocation, and which not? *Cf. Morales*, 514 U.S. at 510 n.7.

The Due Process Clause is intended to serve the purpose of "[insuring] the fair and orderly administration of the laws." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319 (1945); *see also, e.g., Loper v. Beto*, 405 U.S. 473, 494 (1972) (Burger, C.J., dissenting) [referring to the "very notion[] of ... orderliness embodied in the Due Process Clause"]. The State seeks, and the California Supreme Court held, the opposite. *See supra*, p. 1.

Petitioner doubts the Framers of our Constitution had such a disorderly view of the role of government. To the contrary: "Stability in Government, is essential to national character, and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society." James Madison, The Federalist No. 37.

B. Substantive Statutes Of Limitation

The State offers virtually nothing in response to the argument in Part II(B) of the petition. However, the State doesn't dispute the existence of the "substantive right" line of cases, which rely on federal and state Due Process guarantees to hold that substantive statutes of limitation cannot be retroactively abolished once they have expired. *See* Petn. at 16. As petitioner has shown, Petr. at 16-17, there is a split of authority on this subject. The State offers only a sentence of *ipse dixit* to the contrary. Br. Opp. at 27.

The distinction between procedural and substantive statutes of limitation clearly is significant. The petition set forth a logical and supported analysis of how that significance relates to the Due Process Clause and the issue here, firmly rooted in traditional state and federal jurisprudence. The State has made no effort to respond.

Dated this 10th day of April, 2000.

Respectfully submitted,

Michael B. Dashjian (Counsel of Record)
Sylvia M. Dashjian
P.O. Box 512
San Luis Obispo CA 93406-0512
(805) 460-0300
Counsel for the Petitioner